John Chipman Gray



# AMERICAN BAR ASSOCIATION JOVRNAL

June 1943

# The More Security You Give Your Family Now, the Greater Their Need of Future Security

THE MORE you do for your family while you're alive, the more important it is to give them assurance of security in case of your death. It is a very difficult and distressing experience for a family which has always enjoyed the comforts and luxuries of life to have to step down to a much lower standard of living. As a matter of fact, it is much better to deny your family some of the things they might like to have now and use the money to assure them a reasonable degree of comfort and security in event of your death, rather than to give them everything now but provide little security for their future.

It doesn't cost much to give your family a reasonable degree of security for the future. Not since The Travelers developed its new Triple Protection plan. Under this new plan a man of 35 can assure his family from $7,500 to $75,000 Life insurance protection in case of his death before 1963 at a cost of slightly less than $1 per $1,000 per month.

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## *There is . . . "a time to laugh" . . .*

*Ecclesiastes 3:4*

### Knows Her Husband

Mrs. A to Mrs. B:

"I can read my husband like a book."

Mrs. B:

"You must have good eyesight to read such small print."

### Street Scene

British bombers were over Berlin. The sirens were screaming and the people were racing for the shelters.

"Hurry up!" cried the housewife to her spouse.

"I can't find my false teeth," called the befuddled and tardy husband.

"False teeth!" returned the exasperated wife, "what do you think they're dropping, sandwiches?"

### Horse Sense

Farmer to friend:

"This horse knows as much as I do."

Friend:

"I would advise you not to say anything to anybody about it, you might want to sell him sometime."

### Who Guarantees the Title?

A New York firm asked the opinion of a New Orleans lawyer about the title to a parcel of land in Louisiana. The New Orleans lawyer rendered an opinion tracing the title back to 1803. The New York firm wrote again to the New Orleans lawyer, saying that the opinion rendered was all right as far as it went, but that the title prior to 1803 had not been satisfactorily covered. The New Orleans lawyer replied as follows:

> Please be advised that in the year 1803 the United States of America acquired the Territory of Louisiana from the Republic of France by purchase; The Republic of France had in turn acquired title from the Spanish Crown by conquest, the Spanish Crown having originally acquired title by virtue of the discoveries of one Christopher Columbus, a Genoese sailor who had been duly authorized to embark upon his voyages of discovery by Isabella, Queen of Spain; Isabella before granting such authority had obtained the sanction of His Holiness, The Pope; The Pope is the vicar on earth of Jesus Christ; Jesus Christ is the son and heir-apparent of God; God made Louisiana.

### Filial Affection

An Irishman swore out a warrant against his three sons to keep the peace. He concluded his affidavit: "And this deponent further saith that the only one of his children who showed him any real affection was his youngest son, Larry, who never struck him when he was down."

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**Mr. Justice Roberts Speaks on the Law of Nations**—We give in this issue Justice Roberts' address on the necessity and the feasibility of an organization for the development and enforcement of international law.

"No plan of organization, however apt, however desirable, can have any chance of adoption or successful operation unless it is backed by the sentiment of the American electorate," he points out in discussing a plan for a supra-national government after the war.

**John Henry Wigmore**—The loss of one of the world's foremost legal scholars is further commemorated in this number. We give, first, a memorial notice by one of his colleagues in the Law School of Northwestern University; and, second, a touching personal sketch of the other side of the character of the great scholar—his warm, human interest. The Dean's thousands of friends and admirers will be glad that the beauty of the final scene has been preserved.

**Dean Wigmore's Last Contribution**—With pride and sorrow we print in this number the last of many articles written for us by one of our firmest friends, "Our Naturalization Law: A Post-War International Problem," with one of the Dean's characteristic details—a pen-and-ink sketch to make a complicated geographical description clearer to the reader.

**Lawyers in the Army**—Lieutenant Walter P. Armstrong, Jr. of the United States Army, gives an outline of military law as soldiers need to know it, and indicates the value, to the lawyer in service, of some knowledge of how this code of law is administered.

## ANNUAL TOPICAL INDEX

In Volume 62 of the American Bar Association Reports there was printed a complete index of subjects dealt with in the first 23 volumes of the JOURNAL. In Volume 65 of the Reports and subsequent volumes, topical indexes of Volume XXIV of the JOURNAL and of each succeeding volume, have been printed. Reprints are available at $1 each of the topical index of the first 23 volumes.

**War and the Courts of England**—A competent hand has sketched for us the outline of how this works out.

**Book Reviews**—Several current books are reviewed in this issue.

**Supreme Court of the United States**—Seventeen opinions, handed down from April 19 to May 10, are reviewed or summarized in this issue:

*Jehovah's Witnesses*—First are the three cases involving the claim of this sect that their freedom of speech and freedom of religion have been interfered with. There are long dissents. Both majority and minority opinions are quoted from extensively.

*Railroads and Truck Competition*—The Court upheld tariffs designed to enable railroads to hold their own in competition with trucks.

*Power Transmission*—A case discusses the relation between intrastate and interstate distribution of electric energy.

*Taxation*—There are a few cases on federal taxes.

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*Labor Law*—There are two or three cases involving the National Labor Relations Act.

*Criminal Law*—Several cases have to do with convictions under federal statutes, or (more often) under state statutes.

**American Law Institute Annual Meeting**—In compliance with the request of the Office of Defense Transportation, the attendance at the annual meeting was greatly reduced, but the subjects dealt with by those particularly charged with the responsibility on the restatement of the law of Property and the preliminary discussion of a proposed international bill of rights was full of interest and is made available to those who could not attend.

# CURRENT EVENTS

## Wigmore Memorial Service

A MEMORIAL service in honor of the late John H. Wigmore, dean emeritus of the School of Law of Northwestern University, will be held on Friday, June 11, at 4:00 P.M. in Thorne Hall on the Chicago campus.

Kenneth F. Burgess, president of the board of trustees of Northwestern University, will preside, and the Reverend Frederick L. Barry, rector of St. Luke's Church of Evanston, will give the invocation.

Memorial addresses will be made by Judge Evan A. Evans on behalf of the bench, Charles P. Megan on behalf of the bar, Col. Nathan William MacChesney for the board of trustees of the University, Robert W. Millar for the faculty of the School of Law, and President Franklyn B. Snyder.

Stephen Love, member of the School of Law faculty, is in charge of arrangements for the service.

## 1943 Awards of Merit to Bar Associations

UNDER authority of the House of Delegates of the American Bar Association, a committee has been appointed to make the 1943 Awards of Merit to the state and local bar associations performing the most outstanding and constructive work in the current year. Separate awards are made for local associations in counties or cities of more than 100,000 population and for localities of less than 100,000 population.

The awards will be made at the annual meeting of the American Bar Association in Chicago, Illinois, August 23-26. Applications must be filed on or before July 24, 1943, and blanks may be secured from the Headquarters Office, 1140 North Dearborn Street, Chicago, Illinois.

## Wisconsin Bar Is Integrated

THE Wisconsin legislature, overriding the Governor's veto by a close margin, has completed its action to integrate the Bar in that state.

The measure passed creates the "State Bar of Wisconsin," and requires all lawyers who wish to practice in the state to become members. The supreme court now has authority over the government of the organization and the rights, obligations and conditions of membership. Since 1935 the subject of integration has been a part of every legislative session.

### Civilian Defense Manual

The Office of Civilian Defense has made available to the Association a supply of the recently published *Civilian Defense Manual on Legal Aspects of Civilian Protection,* which was prepared by the Association's Committee on Civilian Defense.

Members may obtain upon request this 240 page authoritative and timely reference volume from Headquarters Office by sending 15c to cover the cost of handling and mailing.

## Civilian Rights of Navy Personnel

BY authority of Vice Admiral Greenslade, Commandant, Twelfth Naval District, a handbook has been issued for the naval corps concerning powers of attorney, wills, transfers of real and personal property, including bank accounts, and questions arising under the Soldiers' and Sailors' Civil Relief Act of 1940.

## Additional Law List Approved

THE Special Committee on Law Lists has issued a certificate of compliance to the United Publishing Company, Liberty Bank Building, Dallas, Texas, for the 1943 roster of the United Lawyers-Adjusters Insurance Service Association.

## Special Libraries Association 1943 Wartime Conference

THE theme underlying the several sessions of the 1943 Wartime Conference of the Special Libraries Association on June 22-24 in New York will be "Information for Victory." Members of the association, a national organization with 18 chapters in the United States and two in Canada, are information specialists in advertising agencies, banks, chemical firms, engineering companies, insurance companies, government agencies, museums, newspapers, religious institutions: in short, in virtually every field of knowledge.

One of the general sessions will feature nationally known speakers on the subject of Wartime Information and ten groups will hold their own sessions with programs devoted to their special problems.

## Department of Justice Library Honors St. Ives

THE Director of Libraries, Department of Justice, M. A. McKavitt, has prepared an exhibit of St. Ives, the lawyer's patron saint, whose calendar day is May 19. On that date in 1347, Pope Clement VI at a solemn consistory ordered the name of St. Ives placed in the calendar of saints. The exhibit in the Library of the Department includes an extensive bibliography.

# TOWARD POST-WAR WORLD ORDER*

By HONORABLE OWEN J. ROBERTS

Associate Justice of the Supreme Court of the United States

THE development of international law in the last fifty years has been substantial. It seems fair to say that this recent development is greater than the world has witnessed in historical time.

International law, viewed as the formulation of the customs of civilized nations in the conduct of their mutual relations, has become a great corpus of jurisprudence through the consensus of experts working in the field. In addition, there has recently grown a large body of contractual international law embodied in the formal agreements to which nations are parties.

The last two decades have also witnessed an encouraging advance in the resort to adjudication of international disputes. The practice of submission of questions arising between nations to the Permanent Court of International Justice has been a long step forward in the recognition of right principles in composing international differences.

In the years following the First World War there seemed reason to hope that, by a course of evolution, nations would come to adopt these methods of adjusting their mutual concerns and that the rule of reason and justice might more and more pervade the settlement of questions arising between them.

The invaluable services of the League of Nations in many fields, but particularly those of health and hygiene, economics, and industrial relations, gave hope of further progress and fuller understanding and cooperation. The many peace treaties by which nations covenanted to make their best endeavor to settle disputes arising between them, without resort to force, seemed to promise the ultimate outlawry of war. The general satisfaction with the work of the Permanent Court of International Justice foreshadowed increasing resort to that tribunal.

The League of Nations itself was far in advance of anything the world had known as an instrument of international political control of national sovereign rights.

But it became increasingly evident from 1933 that all existing instruments of international cooperation and adjudication would prove inadequate to preserve the world from resort to force. It became evident that the only existing sanction of international faith and honor, namely, the sentiment of the majority of civilized men, would prove insufficient to deter some nations from flouting both the express covenants to which they were parties and the corpus of established principles of international law which has grown with the advance of civilized living. The present war is witness to the fact that, in world crises begotten by race pride, by the lust for national aggrandizement, and by national selfishness, international law is powerless.

The international role which the United States has played has been conditioned by the state of public opinion in the nation.

In each of the two world wars our Government, responsive to the popular will, initially attempted to play the part of a neutral. In both cases our citizens have, after serious and costly delay, discovered that the world's business is our business; that we cannot erect a wall and sit safely behind it while the flames of war rage beyond our borders; that we must act not only for the vindication of the principles to which our Government is dedicated but, from a merely selfish point of view, we must defend the personal and economic freedom of our citizens or lose it. And so, tardily and unwillingly, the people of the United States have been forced to throw the weight of their will and their resources to the support of the efforts of nations fighting to vindicate those principles for which we stand. I believe that we have come to realize that we cannot, as a nation, live in isolation; to understand that, if we are to have the essentials of our free democratic way of life we must join other nations in means and methods to perpetuate world peace through world cooperation.

Our recent experience teaches that all the expedients to which the nations have turned are insufficient to keep the peace. We have learned that leagues, treaties, agreements, voluntary submission of disputes to a world court, fall short of reaching the goal. What other recourse is there? Our own national experience as a federation of independent sovereigns seems to point to at least one avenue to be explored. Is it not plain that, so long as national sovereignty remains absolute, no means will exist for preventing the abnegation of the obligations of international good faith? Must there not be a fundamental framework of government to which the people of each constituent nation surrender such portion of their nation's sovereign prerogative as is essential to an international order; that each nation be bound by certain agreed rules so that no single nation, and no group of nations, can, for any reason, or for no reason, assert its or their unbridled will by resort to arms?

What I read, and what I hear, leads me to believe that, amongst men of your background and training, and indeed amongst the thinking laymen of the United States, the overwhelming opinion is that some such organic and fundamental law must be adopted if we are to have world order and world peace. Men differ widely as to the character of the structure and the powers to be conferred upon a supra-national government and

*Address delivered at the dinner of the American Society of International Law, Washington, D. C., May 1, 1943.

the machinery by which those powers are to be implemented. These are matters in connection with which experts like yourselves can be of inestimable aid. The difficulties of framing such an organization admittedly are enormous. They challenge the best ingenuity and skill of the most expert.

Naturally there will be differences as to detail. But it seems to me that there ought not to be much difference of view respecting certain fundamental requirements. Supra-national law must be law affecting and binding individual citizens of the nations belonging to the supra-national government, in the same sense that the law of the United States, consisting of the Constitution, and the statutes adopted pursuant to it, bind every citizen of the nation. The contrast between the Articles of Confederation and the Constitution in this aspect is sufficient to enforce the conclusion. The United States could never have persisted through the 150 years of its life if the laws of the nation had been addressed to, and binding upon, the states as entities rather than upon the individual citizens of the states. The police force of any government necessarily must enforce the law of that government against its citizens—not against the state or nation to which those citizens belong. Enforcement as against a citizen is a police function; enforcement against state or nation as an entity is war.

The psychology back of federal legislation is that the citizen's loyalty and fealty to the nation stand over against his loyalty to his particular state. That balance of loyalties, with all its obvious value, would be lost if issues between the federal government and its constituent members were closed by the mandate of the federal government to the state instead of to its citizens.

It seems obvious that a world government must have a representative assembly to implement its delegated powers. Equally plain is the necessity for an executive to administer the laws and see to their enforcement. And under that executive there must be an independent police to effectuate the legislative policy and the executive action pursuant to it.

Lastly, there must be a judiciary to which disputes between the citizens and the supra-national government, between citizens and any nation a party to that government, and between nations, must be submitted for adjudication.

These three instrumentalities are essential if we are to avoid the weakness and inefficiencies of all prior forms of international cooperation. Treaties, league covenants, and agreements which may be repudiated at the wish or whim of any nation party to them leaves the adherents to the compact little or no power to compel recusant signatories to comply with their undertakings. And a world court whose jurisdiction can only be invoked by willing nations is helpless to prevent such violation of plighted faith.

I shall not stop to discuss the details of structure and powers of international government. As I have said, these matters challenge the ingenuity, the skill, and the imagination of those who are indoctrinated in the theory of government and who are expert in international law. Given adherence to the fundamental propositions I have stated, I have enough confidence in the intelligence of mankind to believe that a convention of delegates from the nations can overcome the difficulties presented, as the Constitutional Convention of 1787 overcame those confronting it.

I turn to some objections and caveats currently put forward. First, it is said that nations are not ready to be tied together in a complicated governmental organization wholly new and untried. I answer that the important matter is not how much but how little authority should, in the first instance, be delegated to any such government. It would seem that a very simple Bill of Rights—a power to raise and support armies, a commerce power analogous to that exercised in the United States by the Congress, a power to create an international medium of exchange, and a power to create an international postal system, would be essential, and that little, if anything, more should initially be attempted; perhaps not so much.

It is said that any such project is but the mental concept of the amateur and the naive; that nations, other than the existing democracies, would find the scheme antithetic to their notions of government and international relations and consequently would refuse adherence to it. My answer is that, while we should make the framework broad enough to permit the ultimate entry of every nation which desired to join and was able to institute a popular form of government approximating our notions of democracy, we should not wait to organize a supra-national government until all, or a great majority of nations, were ready and willing to enter. Certainly the people of the British Commonwealth of Nations and the people of the United States would understand and readily accommodate themselves to such an organization; and in western Europe there are many more nations of which the same may be said. These, if they keep the door open to others of like mind, could, with the greatest advantage, amalgamate now in an international government. Indeed it might be better that, in the first instance, they alone should do so. This could be no affront to other nations but, on the other hand, it would have the enormous advantage of presently consolidating international policy in respect of the postwar settlement. It would obviate discrepancies and differences, confusion and delay, and the inherent weakness which follows from divided counsels.

Of a piece with the same criticism is the assertion that nothing should be done towards postwar world organization until after a long cooling-off period. In my view, no doctrine can be more dangerous. When the war ceases, great populations will be left without government, without national solidarity, in utter confusion with respect to the future. For the allied nations

to endeavor, by negotiation amongst themselves, to provide a stop-gap while they jointly plan their future course with respect to other nations and other peoples will beget only discord, the emergence of the age-old national jealousies and claims and result in an ultimate settlement comparable to that at Versailles. If, when the peace comes, a strong union of democracies speaks on these matters with a united voice, and holds out even to the conquered people of Europe opportunity for ultimate partnership, under proper conditions, a very different picture will be presented.

The last and most prevalent objection is that the people of the democracies, and especially the people of the United States, will never consent to surrender any portion of the national sovereignty. If this objection be valid, that ends the discussion. We may as well then throw up our hands and let the world roll on into chaos. Unless the United States espouses, and promptly and vigorously urges, a project of world organization, none such will reach fruition.

No plan of organization, however apt, however desirable, can have any chance of adoption or successful operation unless it is backed by the sentiment of the American electorate. The man in the street may not be competent to judge of the details of such a plan. But he is competent to comprehend the principles upon which a union should be built. He is competent to envisage in a broad way what it is he is willing to have his government adopt, what elements of national sovereignty he is willing to surrender and to pool with the peoples of other nations, and he is competent to say whether he wishes his government to embark upon a daring but hopeful experiment of world organization.

Unless the great majority of our people agree that their chosen leaders shall adhere to an acceptable form of world organization, nothing can be accomplished. Our national way is for the leaders, students, and experts to impart to their fellow citizens their views and their reasons for holding them, and thus promote sound public opinion. Men like yourselves who must feel that this war will be fought in vain unless we can win the peace have a high duty to enter the forum of public opinion and make your influence felt. And our nation will not take her stand for unselfish and enlightened international cooperation unless her leaders are convinced that it is the will of an overwhelming majority of our people that an appropriate organization be created to that end. Nor will our leaders speak to the leaders of other nations with authority unless the body of public sentiment in this country gives assurance that what is agreed upon will be carried out by our government. It will be as unfair as it will be fatal to leave our representatives in the equivocal position in which President Wilson stood after the proposal by him, and acceptance by our allies, of the plan for the League of Nations.

Our obligation then is to arouse and enliven public sentiment in this country in support of an integration of our own and other nations in a world organization having the purpose and the power to adjust the relations of the peoples of the earth in accordance with the dictates of justice, and to promote and, if necessary, enforce the peaceful composition of all differences and disputes which may occur.

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# INTERNATIONAL LAW

INTERNATIONAL law governing the relations between independent nations is an instrument. Back of that law there has been, at least to some extent, and must be in the future to a far greater extent, a community of nations. Peace among men can only be maintained by one of two methods: we will have either that imperialism which results from force—a Roman peace which means the subjugation of the weaker nations by the stronger, where law becomes imperial fiat—or we may have a law which has the consent of the nations united in a community in which the interests of all transcend that of any one. Such a situation represents a higher form of civilization; a situation in which reason and justice are the dominant factors. The lawyer class represents the reverse of force, the policy of reason and justice. Whether we base the hopes of men upon natural law, the inherent rights of man, or upon that "due process of law" which requires notice and hearing before there can be condemnation, the result is much the same. . . .

I am convinced that despite the dark outlook which thirty years of war, revolution and continued unrest have cast upon the world, there are certain factors which may enable us to hope for a better future. We have as an important element that understanding which exists between the English-speaking people who have for nearly a century and a half found that their conflicts of interest may be solved by the methods of the diplomat and lawyer, and that these conflicts are susceptible of admission to judicial determination. The other factor of cardinal importance is the Pan American idea and organization. The nations of this continent, imbued with a desire for independence from imperial domination, threw off all alien yoke. Today they stand solidly arrayed against any attempt to fasten a foreign or an alien system upon any of them. More than that, affirmatively they stand together to maintain peace and law throughout this Western World.

FREDERIC R. COUDERT

*at meeting of the Council of the Inter-American Bar Association, Washington, D. C., November 20, 1942*

# OUR NATURALIZATION LAW

## A Post-War International Problem

By JOHN H. WIGMORE

AMONG the legal problems that are certain to be presented for settlement at the post-war conference table is that of the so-called "equality of races," in its relation to the United States naturalization law and immigration law. Therefore it is worth while for our profession to begin reflecting on the subject, so as to be able to advise our delegates wisely on the legal aspects of the problem.

That the principle known as "equality of races" is certain to be presented for recognition is obvious for several reasons, viz., because it is already included in many of the programs now being publicly formulated; because the able and heroic achievements of the Chinese Nation in wartime have demonstrated that its race-stock possesses the highest qualities of national merit; because the powerful United Soviet Republics will inevitably expect equal treatment for their component republics now subject to discrimination; because the people of India, on attaining self-government as a nation, will surely demand that their race-stocks no longer be treated with discrimination; and because the German Government's uncivilized conduct of the war has forever deprived the term "Aryan race" of entitling that race-stock to claim a monopoly of civilized virtues in contrast to the Asiatic race-stocks. And the settlement of this abstract "equality of races" must sooner or later take the concrete form of application in those national laws for naturalization and immigration which in the United States and in some component nations of the British Commonwealth and in some Latin-American nations now maintain certain discriminations based on race-stock or geographical areas.

On the other hand, it is equally certain that the people of the United States will never consent to surrender the control of their immigration policy to the dictates of any international body, and that they will be reluctant to promise any change in their naturalization laws which would involve the discarding or modification of some traditional definitions framed in terms of race.

Such is the dilemma. Is there a practicable solution of it?

To determine this, let us briefly scrutinize (A) The United States Naturalization and Immigration Laws; and then consider (B) A Possible Solution.

### A. Naturalization and Immigration Laws

I. *Naturalization.* The race-limitations upon naturalization by voluntary act are now all comprised in a single statutory section, U. S. Code tit. 8, §703: "The right to become a naturalized citizen under the provisions of this chapter shall extend only to [1] white persons, [2] persons of African nativity or descent, [3] descendants of races indigenous to the Western Hemisphere" and [4] to Filipinos who have served in the Armed Services.

(1) "White persons" (originally "free white persons") dates from the first naturalization statute of 1790, March 26. The definition word "white" thus comes down from a period in the infancy of ethnological science, when the entire human family was popularly classified into the white, black, yellow, and brown (or red) races. Since immigration from non-English speaking countries became copious, and since judges have been faced with the task of reconciling modern ethnological knowledge with those long out-moded categories, the judicial interpretation of the term "white" has been anything but easy. *Excluded* have been Arabs; Afghans; Indians (of Asia; a museum of race-stocks); Burmese; Chinese; Japanese; Filipinos; Koreans. *Admitted* have been Arabs;[1] Armenians; Syrians; Mexicans; Turks.

(2) "Persons of African nativity or descent" dates from an Act of 1870, July 14—apparently a well-meant gesture of post-Civil-War logical generosity; because, if the negroes in the United States were to be citizens by birth, why should not their cousins left behind in Africa be eligible? However, the draftsmen probably did not realize the effective scope of this clause, for it has been literally interpreted to include "all native-born Africans from the Mediterranean to the Cape of Good Hope,"[2]—thus making eligible the Arabs and the Moors of North Africa, the Hamitics of the Sudan, the Pygmies of Central Africa, the real Negroes and Negroids of Central and South Africa (having infinite gradations of civilization and uncivilization), and the Hollander stock of South Africa (who would in any case be eligible as "white").

(3) "Descendants of races indigenous to the Western Hemisphere" was recently added in the codified Nationality Act of 1940. Its expressed purpose was "to more firmly cement the ties of international friendship between the United States and the Pan-American countries,[3]—thus making eligible, not only the already

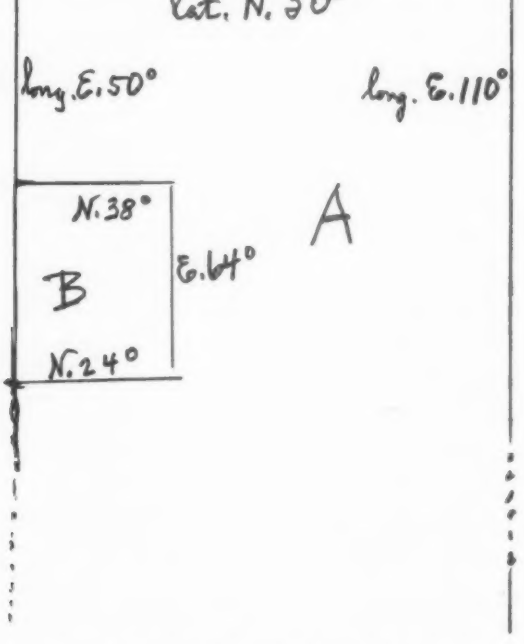
1. Arabs admitted, Hackworth Digest of International Law, §225, p. 46; excluded, In re Ahmed Hassan, 48 Fed. Supp. 843.
2. Matter of San C. Po, 1894, 28 N. Y. Suppl. 383.
3. Message of the President, transmitting a Report on the Proposed Codification, etc. Washington, 1939, Part I, §303, p. 22.

eligible ("white") Spanish and Portuguese race-stocks, but also the head-hunting Jivaros of the upper Amazon and all the other low-grade tribes of the interior jungles, but also the high-grade descendants of the Andean Incas and Chimu-Nascas and of the Mexican Aztecs and Mayas—all of which latter peoples, by accord of modern anthropologists, stem from North Asiatic migrations of several thousand years ago.

The United States Indians—who by like accord came to America from Asia—had already been made citizens at birth, by the Act of 1887, February 8, §6, now Code tit. 8, §601, par (6); which, to make good measure, gives citizenship to "a person born in the United States to a member of an Indian, Eskimo, Aleutian, or other aboriginal tribe."

The apparent purpose of this legislation (Code §703), in broad, rough outlines, is to confer eligibility on natives of the two Americas, of Europe, of Africa, and of "whites" in Australia, but to omit natives of Asia and adjacent islands. But a critical examination of the specific and varied content of these areas reveals, as above seen, no possible logical consistency in attaining the avowed purpose of the Nationality Act,[4] viz., "to facilitate the naturalization of worthy candidates, while protecting the United States against adding to its body of citizens persons who would be a potential liability rather than an asset."

II. *Immigration.* The basic law for immigration now dates from the Act of June 6, 1924, U. S. Code tit. 8, §201, which established the quota system. Title 8 of the Code includes this law and all prior ones. In its present aspect its exclusionary provisions (§136) cover (1) persons of specified undesirable qualities, physical, mental, and moral; (2) persons of racial origin.




Above is an exact reproduction of the sketch made by Dean Wigmore to accompany this article.

(1) *Qualitative exclusions.* The former group includes in successive paragraphs (Code tit. 8, §136): (a) idiots, insane, etc., (b) paupers, etc., (c) tuberculants, etc., (d) defectives incapable of earning a livelihood, (e) convicts, (f) polygamists, (g) prostitutes, etc., (h) contract laborers, (i) persons likely to become a public charge, (j) previous deportees, (k) persons whose passage others have paid for, (l) stowaways, (m) children under 16 coming alone, (n) illiterates; and further (§137) anarchists and persons believing in forcible overthrow of the United States Government, etc., and (§138) persons imported for prostitution or any other immoral purpose.

(2) Then come the *racial-origin limitations:*

*First, "Chinese laborers"* were excluded by St. 1882, May 6, now Code tit. 8, §263.

*Secondly,* "Aliens ineligible to citizenship" were excluded by §13(c) of the Act of 1924, June 26, now Code tit. 8, §213 par. (c). This paragraph was aimed directly at the Japanese, supplanting and terminating the "Gentlemen's Agreement" (admitting a small quota) which had been in force for nearly 20 years. But the phrasing of this Code §213 (c), also excludes the other Oriental peoples disqualified to be citizens (*supra,* par. I).

*Thirdly,* natives of the so-called *"barred zone"* in Asia are excluded by Code tit. 8, § 136, par. (n). This peculiar paragraph dates from an Act of February 5, 1917. Though admitting certain classes such as diplomatic officers, students, merchants, lawyers, etc., it excludes (see diagram A) all natives of an area of Asia described as lying between long. E. 50° and E. 110° and south of lat. N. 50°, except (see diagram B) a square space within the above rectangle, formed by long. E. 50°-E. 64° and lat. N. 30°-N. 24°; and it also excludes natives of Asiatic islands lying between lat. N. 2° and S. 10° and west of long. E. 160°. The latter area includes most Polynesian Islands and the East Indian (mostly Dutch) Islands.

It is the former of these areas that has latent the most significance. It *excludes* natives of China (part), India (all), Burma, Siam, Malay States, Soviet Union (small part), Afghanistan (part), and Arabia (part); the inner excepted square *admits* natives of Persia, Afghanistan, and Soviet Union (small part). But the excluded area has the effect of covering not only India, but a part of what is now the Union of Soviet Socialist Republics. Of the sixteen republics now forming that Union, it excludes the greater area of three or four of them. For example, it excludes natives of the Uzbek Republic with six million inhabitants; its present capital, Tashkent, has a population of half a million, and its former chief city, Bokhara, has been one of

4. Message of the President, *(supra),* p. vi.

the world's great religious centers, with 400 mosques, and 100 colleges of Islamic theology and law.

Thus the racial exclusions of the "barred zone" affect our relations with our powerful ally the Union of Soviet Socialist Republics, and our relations with the vast colonial dependencies of our exiled ally, Queen Wilhelmina, as well as with a future self-governing India. The apparent legislative purpose in 1917 was to admit Persians (as Aryan?), but to exclude all remaining Asiatic peoples except those of Russian Siberia, by a geographical description which evaded naming names.[5] But the peculiar lines of latitude and longitude, and the changes of circumstance in a quarter of a century, have made this "barred zone" a bizarre standard, which is not only ethnologically empty of sense but politically portentous of protests.

Such are the racial discriminations under the immigration laws.

III. *Race as a super-added disqualification.* Let us recall, then, that there are already excluded under the immigration law a long list of undesirable classes,—insane, defectives, paupers, prostitutes, panderers, convicts, etc., etc., and notably, illiterates, and under the naturalization law, persons unable to speak the English language (to which might and should be added "and read and write" that language). So, the question arises: What is the value of adding to these limitations a racial origin for effecting the officially stated purpose of not "adding to its body of citizens persons who would be a potential liability rather than an asset"?

In the light of the ethnological complications above set forth, may we not draw certain inferences?[6]

1. *Logically,* is it not impossible to administer the term "white" consistently? Since our original statute of 1790, many classifications of the races of mankind by ethnologists have taken the field, but only to be discarded or disputed one after the other. The color-test—white, black, yellow, brown—was succeeded by a *geographical* one—Caucasian, Mongolian, Malayan, African, etc. Then came a long-regnant *linguistic* one,—Aryan, Turanian, etc., now discarded by all, except by the Nazi scientists. Then prevailed the *cranial* measurement,—dolichocephalic (long-headed), brachycephalic (short-headed), mesocephalic (medium-headed),—still accepted for certain purposes. And now the favorite classification seems to be based on the *hair*-type,—leiotrichous (straight-haired), ulotrichous (wooly-haired), cymotrichous (wavy-haired),—said by a modern American anthropologist to be "the most perfect of the criteria of race." But the intricate distribution of peoples by modern classifications, their innumerable crossings, and their variant significance in traits of character, overlap and confuse all geographical and national boundaries, and leave the legislator in helpless bewilderment with his problem.[7]

2. *Politically,* are not the prohibitive racial terms and areas, as above described, sure breeders of unfriendship and friction with other nations? No matter what form is to be taken by the post-war association of nations, will it be politic for the United States to maintain racial discriminations against natives of such nations, for example, as China, India, the Netherlands dependencies, and some of the component Soviet Republics?

3. *Effectively,* do the prohibitive racial terms and areas, as above described, add anything to the other limitations on immigration and naturalization, from the point of view of the law's avowed purpose? If the present long lists of immigrant undesirables—defectives, convicts, paupers, illiterates, etc., etc.,—are kept out, and if those who cannot read, speak, and write the English language, are debarred from naturalization, will not these requirements exclude all the really debased individuals from Asia and elsewhere, *as well as the now naturalizable debased stocks from Africa and Latin America?*

4. *Quantitatively,* does not the quota system prevent a disproportionate importation from any one region? Can it not be applied, by treaty and statute, with equal effect to any of the nations whose natives are now entirely excluded?

### B. A Possible Solution

In the light of the foregoing considerations, would not the following revised system answer all purposes:

1. *Immigration. No person shall be admitted who belongs to one of the following classes: (a) insane, (b) defective, (c) illiterate, etc., etc., etc.* (as now, but omitting the present "barred zone," the Chinese laborer provision, and the provision about ineligibility for citizenship).

2. *Naturalization. An alien shall be eligible for naturalization who (a) has lawfully entered the United States as an immigrant, (b) has resided for five years in the United States, (c) is able to read, speak, and write the English language, (d) and has been during that period a person of good moral character, etc.* (as in Code tit. 8, §707).

But (as now, Code tit. 8, §§705, 706), no person shall be naturalized who believes in the overthrow by force or violence of the Government of the United States, etc., etc. or who deserts the armed forces of the United States during war, etc.

5. Hackworth, Digest of International Law, §225, p. 38.

6. In the following suggestions, *Japan* remains entirely out of the picture; for of course, as one of the major Axis delinquents in World War II, Japan must pay the penalty of forfeiting any privileges that it might otherwise obtain.

7. See W. Z. Ripley, The Races of Europe (1900); A. C. Haddon, The Races of Mankind (1924); L. H. D. Buxton, The People of Asia (1925); W. A. Bonger, Race and Crime, translated by Mrs. Gerard Hordyk (now being published by Columbia University Press).

# JOHN HENRY WIGMORE

## 1863-1943

By ALBERT KOCOUREK

Professor, Northwestern University Law School

A RUDE thrust of fate has prematurely removed from the earthly scene a great master of the law, a great gentleman, and a great human being. Dean Wigmore had completed his eightieth year. *Non seguibus annis sed actis ævum implebat*—his life was measured by toil and not in sluggish years. Excluding supplementary volumes and earlier editions, he had published forty-two original volumes, including ten volumes of the *magnum opus*, "A Treatise on Evidence," and thirteen volumes of *opera minora*. He had also put out seven volumes of case-books or other compilations. In addition, he had arranged, edited, written various introductions to, and provided translations for, thirty other volumes. In the publication of the edited volumes, with the exception of Greenleaf on Evidence (16th ed., Vol. I), he had the cooperation of many others, but next to the authors themselves, it cannot be doubted that his part, both qualitatively and quantitatively, was very important.

This sum total of seventy-nine volumes, even after such diminution for the part contributed by others, as may be necessary, perhaps has never been exceeded in sheer bulk by any law writer. Moreover, against the diminution suggested, it is probable additions will be found, if and when the account is finally stated.

It is a curious fact that in all these labors, Dean Wigmore never made use of a professional research assistant. The illumination and the drudgery were his alone. He wrote a clear hand and his copy could go to the printer without the delay (and mistakes) of an intermediate type-script. He read his own proofs. He could read a three-page galley proof in what amounted to little more than a glance. In that glance he would detect the most obscure errors wherever they lurked on the galley.

The Treatise on Evidence has been rated as one of the greatest intellectual feats in law-writing of any age or of any country. Dean Wigmore is best known in this country and England through this notable work. By means of it he had always maintained a close contact in Common Law countries with the practicing lawyer, who has long since discovered that this treatise contains much more than the unfamiliar words, "autoptic proference." In continental Europe, evidence is not a subject but only a topic, and in consequence Dean Wigmore's fame in Europe rested on different grounds.

Dean Wigmore's career suggests a comparison with the lives of such great legal personalities, among others, as Jeremy Bentham, Sir Frederick Pollock, Mr. Justice Holmes, and Josef Kohler. Such a comparison is not here in question. It will suffice to recall that Dean Roscoe Pound, himself a distinguished intellectual athlete and a formidable legal scholar, generously rated Dean Wigmore as our "first legal scholar."

Dean Wigmore was the Crichton *admirabilis* of his time. His natural endowments were far above the average and his accomplishments prodigious. He was a con-

Dean and Mrs. Wigmore in the Law School Gardens, Northwestern University

siderable linguist and in addition to familiarity with the most important European languages, including Russian, he could read Arabic and speak Japanese. He was composer of some delicately beautiful piano music, especially ballads.

For many the most outstanding feature of Dean Wigmore's great career is not the monuments of vast learning that he created but the rare nobility of his life. As Samuel Johnson said of Lord Chesterfield, his manners were "exquisitely elegant." At this point the comparison stops, for Dean Wigmore never was an opportunist. He was a man of deep sincerity; he was naturally generous; he was a man of good will, and, as hundreds know, he had a kind heart. He was an aristocrat in his own standards and overlooked shortcomings in others that he did not tolerate in himself. He was easily accessible. His office door, like that of that prince of lawyers, the late John G. Johnson of the Philadelphia Bar, was always open. Anyone might freely approach him. Hundreds came each year—the great and the little. No one was sent away and no one left empty-handed.

Dean Wigmore's career is ended, but the catalytic influence of the man will long be felt. *Vivit enim, vivetque semper.*

## Chronology of the Wigmore Career

1863 Born March 4, San Francisco, California.
1883 A. B. Harvard University.
1884 A. M. Harvard University.
1887 LL.B. Harvard University.
1887-89 Practiced law at Boston.
1887-1942 Author, *Opera Minora* (13 Volumes), being articles published in law journals, etc.
1888 Author, *Digest of the Decisions of the Massachusetts Railroad Commission.*
1889 Author, *The Australian Ballot System.*
1889-92 Professor Anglo-American Law, Keio University, Tokyo, Japan.
1890 Author, *Notes on Land Tenure and Local Institutions in Old Japan.*
1892 Author, *Materials for Study of Private Law in Old Japan* (4 Vols.)
1893 Professor of Law, Northwestern University.
1898 Admitted to Illinois Bar.
1899 Editor, *Greenleaf on Evidence* (16th ed. Vol. I).
1900 Author, *Compiled Examinations in Law.*
1901 Dean, Faculty of Law, Northwestern University.
1904-05 Author, *Treatise on Evidence* (4 Vols.).
1906 LL.D. University of Wisconsin.
1907-09 Co-Editor, *Select Essays in Anglo-American Legal History* (3 Vols.).
1908 Author, *Supplement to Treatise on Evidence* (1 Vol.).
1909 LL.D. Harvard University.
1909 Author, *Pocket Code of Evidence.*
1909 Author, *A Preliminary Bibliography of Modern Criminal Law and Criminology.*
1909 Founder of American Institute of Criminal Law and Criminology; organizer of Journal of Criminal Law and Criminology.
1909-10 President, American Institute of Criminal Law and Criminology.
1908-24 Member, Ill. Commission on Uniform State Laws.
1911-17 Chairman, Committee on Translations, publisher of *Modern Criminal Science Series* (8 Vols.).
1911 Author, *Cases on Torts* (2 Vols.).
1912-28 Chairman, Editorial Committee, publisher of *Continental Legal History Series* (10 Vols.).
1912-25 Chairman, Editorial Committee, publisher of *Modern Legal Philosophy Series* (12 Vols.).
1913 Author, *Cases on Evidence.*
1913 Author, *Principles of Judicial Proof.*
1914 Honorary member Asiatic Society of Japan.
1914 Sixteen Piano Compositions: Madrigal, Ballads, Hymns, Choruses.
1915 Author, *Pocket Code of Evidence* (2d ed.)
1915-18 Co-Editor, Translator, etc., *Evolution of Law Series;* Vol. I, *Sources of Ancient and Primitive Law;* Vol. II, *Primitive and Ancient Legal Institutions;* Vol. III, *Formative Influences of Legal Development.*
1915 Member of Inter-American High Commission.
1916 President of American Association of University Professors.
1916 Commissioned member of Staff of Judge Advocate General, U. S. A., with rank of Major.
1917 Member U. S. Section Inter-American High Commission.
1917 Chairman Editor, *Science and Learning in France.*
1918 Honorary member Society of Public Teachers of Law (England).
1918-19 Chief of Statistical Division, Supervising Compilation of Reports of the Provost Marshal General.
1918 Commissioned Colonel, Staff of Judge Advocate General, U. S. A.
1919 Member, Editorial Committee for America, International Journal of Ethics.
1919 Sub-Committee of Committee on Education and Special Training, publisher of *A Source Book of Military Law and War-Time Legislation.*
1919 Presented with Wigmore Celebration Legal Essays (Festschrift).
1919 Chevalier, Legion of Honor (France).
1920 Lecturer at University of Virginia, Barbour-Page Foundation.
1921 Author, *Problems of Law: Its Past, Present, and Future.*
1923 Author, Revised Edition *Treatise on Evidence.*
1923 Member, League of Nations Committee on Intellectual Co-operation.
1924 Member of General Board, International Association of Penal Law.
1926 Awarded U. S. A. Distinguished Service Medal.
1927 LL.D. *honoris causa,* University of Louvain.
1928 Author, *A Panorama of the World's Legal Systems.*
1929 Organized Scientific Crime Detection Laboratory (Affiliated with Northwestern University).
1929 Organized Air Law Institute and Journal of Air Law (Affiliated with Northwestern University).
1929 Dean Emeritus, Northwestern University School of Law.
1930 Nominated for seat in Permanent Court of International Justice. (Declined.)
1932 Awarded American Bar Association Gold Medal.
1933-43 Member Illinois Commission on Uniform State Laws.
1935 Awarded Order of Sacred Treasure (Japan).
1935 Author, *Student's Handbook of Evidence.*
1935 Author, *Pocket Code of Evidence* (2d Ed.)
1935 LL.D. Northwestern University.
1936 Author, *A Panorama of the World's Legal Systems* (1 Vol. Libr. ed., 2d ed.).
1937 Author, *Principles of Judicial Proof* (2d ed.).

*(Continued on page 356)*

# LAWYERS IN THE ARMY

By WALTER P. ARMSTRONG, Jr.,

First Lieutenant, A. G. D.

AT the present time almost five per cent of our total population is subject to military law. And yet outside of strictly military circles very little seems to be known about the subject. It is generally believed that military law is complex. Nothing could be further from the truth. Military law is punitive only; it has no power to determine cases involving compensation. The large body of non-criminal civil law is eliminated at once. Complicated jurisdictional questions are almost non-existent. Military law is administered in the army day in and day out by men unskilled in legal technique; and on the whole it is administered successfully.

A common misconception is that military law is entirely different from civil law. This is also completely fallacious. The problems dealt with are the same, and the methods used for their solution are very nearly the same. The procedure differs somewhat, but only superficially. And as to the rules of evidence, the thirty-eighth Article of War specifically provides that the President, in promulgating these rules under the power given him by Congress, "shall, insofar as he shall deem practicable, apply the rules of evidence generally recognized in the trial of criminal cases in the district courts of the United States."

There is also a general belief that the administration of military law in the army is entirely in the hands of members of the Judge Advocate General's Department. This is far from the case. That department is extremely small, and tables of organization call for only one of its members to be attached to each division of approximately fifteen thousand men. It is obvious that this one man cannot handle all of the legal problems for so large a group. Also it must be remembered that of the seventeen persons who ordinarily participate in a general court martial it is required that only one, the law member, shall be an officer of the Judge Advocate General's Department except when an officer of that department is not available for the purpose. And not even this is required for Special or Summary Courts Martial.

So every lawyer who is commissioned in the army of the United States may confidently look forward to serving in some capacity, either as a law member or otherwise, upon a court martial. The only requirement is that "when appointing courts martial the appointing authority shall detail as members thereof those officers of the command who, in his opinion, are best qualified for the duty by reason of age, training, experience and judicial temperament; and officers having less than two years' service shall not, if it can be avoided without manifest injury to the service, be appointed as members of courts martial in excess of the minority membership thereof." It is obvious that under these requirements any commanding officer who appoints a court martial is going to call upon the lawyers in his command, whatever their branch of service, to serve upon it.

What is military law? It is the law which governs the members of the army and certain others specifically enumerated in the second Article of War. Its jurisdiction is not exclusive. It is permanent, applying both in time of war and in time of peace. It is punitive only, and can result only in a judgment of "guilty" or "not guilty," the former being subject to qualification in the discretion of the court. It is the law administered by courts martial.

There are three types of courts martial: General, Special, and Summary. A General Court Martial may be appointed by the President of the United States or anyone he may designate, or the commanding general of a division or higher officer, and must include at least five members, one of whom is the law member. A Special Court Martial may be appointed by a regimental or divisional commander or the commander of a separate battalion, and must have three or more members. A Summary Court may be appointed by the same authority as a Special Court Martial, and also by the commander of a separate company; it has only one member.

The jurisdiction of a General Court Martial is unlimited; it may try anyone subject to military law for any offense covered by the Articles of War. Special Courts Martial may not try capital offenses, and their jurisdiction has been limited by the President to enlisted men only. Summary Courts have the power to try any person not an officer for any crime not capital, except that a non-commissioned officer may not be brought before it without his consent or by the authority of an officer competent to appoint a General Court Martial; and again the President has excepted completely from its jurisdiction non-commissioned officers of the grade of technical, first and master sergeant.

The punishment which may be imposed by the various courts, other than a General Court, is also limited. The sentence of a Special Court may not exceed six months' confinement and forfeiture of two-thirds pay for six months; and of a Summary Court, one month's confinement at hard labor, or three months' restriction to limits, and forfeiture of two-thirds of one month's pay.

Cases before courts martial are prosecuted by a Trial Judge Advocate. But his duties are far more than simply those of a prosecuting attorney. He is legal adviser to the court. He swears all witnesses, and also the members of the court. The oath which he administers

to the court indicates the basis upon which the case is to be decided. It deserves to be quoted in full:

> You . . . do swear (or affirm) that you will well and truly try and determine, according to the evidence, the matter now before you, between the United States of America and the person to be tried, and that you will duly administer justice, without partiality, favor, or affection, according to the provisions of the rules and articles for the government of the armies of the United States, and if any doubt should arise, not explained by said articles, then according to your conscience, the best of your understanding, and the custom of war in like cases; and you do further swear (or affirm) that you will not divulge the findings or sentence of the court until they shall be published by the proper authority or duly announced by the court, except to the trial judge advocate and assistant trial judge advocate; neither will you disclose or discover the vote or opinion of any particular member of the court martial upon a challenge or upon the findings or sentence, unless required to give evidence thereof as a witness by a court of justice in due course of law. So help you God.

The questions which determine the legality of the court are three in number: (1) Is the court properly appointed? (2) Are the members competent to sit? (3) Has the court jurisdiction over the accused and the crime charged? Only if all three of the questions can be answered in the affirmative can the court validly hear and decide the case.

In many respects the procedure parallels fairly closely that of the civil courts. But in practice there are many differences. It is important to remember that the members of the court are not trained lawyers. They must depend to a great extent upon the judgment of the Trial Judge Advocate in technical matters. That is why he is far more than a prosecuting attorney. A prosecuting attorney represents only one side of a case and therefore his judgment is biased. A civil court recognizes this and takes it into consideration in ruling upon his motions and objections, deciding with him or against him as it sees fit from its fund of judicial knowledge. But a court martial, not being made up of professional jurists, has no such fund of judicial knowledge to fall back upon and therefore must rely upon the Trial Judge Advocate to supply it. And thus he must be far more careful in making a motion or announcing a rule of law, as the court is inclined to accept it at its face value, and he must be certain that it is worthy of such acceptance. He is not out to get convictions; it is as much, and more, his duty to see that justice is done, and to present all evidence whether it be for or against the accused.

Of course in the case of General Courts Martial the law member is competent to pass upon technical questions. His is the final voice upon the admissibility of evidence. He also passes upon all interlocutory motions, but if there is a dissent he may be overruled by a majority vote of the court. In the final decision he has only a single vote. But on special or summary courts there is no law member. Consequently talk of *res gestae* and such means very little to them. They look to the Trial Judge Advocate for guidance, and he must strike a careful balance between his duties as prosecutor and as legal adviser to the court.

By what law is the court guided in reaching its decision? First, of course, by the Articles of War. These are binding authority. But they do not cover in detail the variety of cases which arise and so they must be supplemented. Therefore under the authority of Article of War 38, the President of the United States has issued the Courts Martial Manual. It is directive in intent, except in cases where he is specifically given the power to modify the Articles of War. These two together form almost the entire basis for military law. In addition the President is given the power under the "General Enabling Act" of 1875 to promulgate regulations for the armed forces, and these regulations have the force of law in courts martial. General and Special Orders of appropriate commands have the same status. Acts of Congress dealing specifically with the military, or applying to it in their general provisions, become an addition to the Articles of War. And as in civil law, above all is the brooding omnipresence of the Constitution.

Aside from these there is a vague and undefinable body of customs of the service and customs of war which the court in its oath swears to uphold. But what is a military custom? There are three requirements which it must meet. It must be well known, uniform, and of long standing. It must be certain and reasonable. And it must not conflict with any law, regulation or order. If it fulfills these three requirements it may be whatever the court interprets it to be.

There is no appeal from the judgment of a court martial. In place of appeal, the sentence of every court martial must be approved by the authority which appointed the court before it can be carried out. Incident to this power to approve is the power to disapprove or approve only in part, and the power to remit or mitigate the sentence or suspend it. However, the reviewing authority may never increase a sentence. In addition, certain cases, including sentences of death, require confirmation by the President of the United States before execution.

Article of War 70 provides certain prerequisites for action upon charges. It requires that a thorough and impartial investigation shall be made before any charge is referred to trial, during which the accused shall have an opportunity to cross-examine all witnesses against him and present any witnesses he may desire on his own behalf. In the case of a General Court Martial, the charges must be referred to the Staff Judge Advocate for consideration. When the accused is placed in confinement, he must be brought to trial as soon as practicable, and any officer responsible for undue delay becomes himself subject to court martial. The charges must be forwarded to the Trial Judge Advocate within eight days, and a copy of the charges served upon the accused. Failure to do so is grounds for a continuance. In time

of peace no person shall be brought to trial before a General Court Martial earlier than five days after the service of charges upon him in order to give him ample time to prepare his case.

This, then, in brief outline, is the skeleton of military law. Of course there are many ramifications, many possible subtleties of construction. The principal problem is that of statutory interpretation. *Stare decisis* plays little part in military law. Decisions of the Judge Advocate General carry some persuasive authority, but they are not readily available, especially in the field, and besides tenuous arguments of this nature are not likely to impress a court of non-lawyers. There are no appeal courts, and so no reported opinions. From time to time memoranda and circulars emanate from the office of the Judge Advocate General, and these take their place in the general scheme of military law.

To return to our original question, what can the lawyer who is in the armed forces do to assist in the war effort by employing the specialized knowledge which he has acquired in the course of his civilian practice? The answer is that he can take any one of a variety of parts in the system of military justice which has been outlined. He can act as Trial Judge Advocate, defense counsel, or as a member of a court, either law or otherwise.

His part in courts martial will be in addition to his other duties and so it will mean extra work; but it will have its compensations. In the first place, the work itself is intensely interesting. In the second, it will serve to keep him in constant contact with the problems and practices to which we all hope to return at some time in the future, and guard him against the loss through neglect of his most valuable possession, his legal knowledge and ability. And third, and most important, it will render a necessary service to his country in time of need. For courts martial are an essential part of the army, more so in time of war than in time of peace. The supply of legally trained men is woefully inadequate; the need for them is critical. Any offer of services is bound to be gratefuly accepted. The soldier-lawyer who wants to do his part in this work should contact the Adjutant of his post or organization and inform him of his qualifications. It will not be long before he will find that his practice, although somewhat different, will be almost as extensive as it was in civilian life.

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# EFFECTS OF THE WAR ON THE BRITISH COURTS

By STANLEY J. WILSON

Solicitor of the Supreme Court of Judicature in England

THE work of the British courts has not been as greatly affected by the war as might have been anticipated. Most of the work now being transacted is work which was being done in the same manner prior to September, 1939. Nevertheless, certain adjustments have had to be made. Provision has been made for greater elasticity in the sitting of the courts so that their work can be continued if, owing to enemy operations, it should become impossible for them to sit at their usual place and time. Trial by jury has been restricted. Certain new courts have been set up.

## I

On September 1, 1939, the day on which the Germans invaded Poland, Parliament passed the Administration of Justice (Emergency Provisions) Act. The principal purpose of this Act was to enable the business of the courts to be carried on despite any enemy operations. The Lord Chancellor was given wide powers to alter the sittings of the superior courts and of the inferior civil courts, and similar powers were given to the Home Secretary with regard to the inferior criminal courts. But no important orders were made under this Act until June, 1940, when regulations were made which enabled any court to alter its own sittings if the court should think it expedient having regard to any hostile operations.

This same Act contained very important provisions with regard to trial by jury in civil cases. Even before the war, the practice of trying a civil case with a jury had become increasingly uncommon. Juries were not, of course, used by the courts hearing civil appeals. With regard to the courts with original civil jurisdiction, the County Courts used juries very rarely, and of the three Divisions of the High Court, the Chancery Division did not use juries, nor did the Probate Divorce and Admiralty Division except in a few defended divorce, and contested probate cases. The third Division of the High Court, the King's Bench Division (whose civil cases include cases of tort and breach of contract) was the traditional home of jury trial of civil cases. But even here there had been a very great decline, dating from the

Judicature Acts of 1873-5. Between 1885 and 1917, roughly half of the cases heard in the King's Bench Division were tried before a judge alone. Then, in 1917, the wartime shortage of manpower led to restrictive measures, but when these were removed in 1925 (with the result that in most cases either party could demand a jury) the recovery was small. Juries were asked for in few cases, owing to the greatly increased expense of the protracted trial which a jury involved. In 1933, following a recommendation of the Business of the Courts Committee, the right to demand a jury trial in civil cases in the King's Bench Division was restricted to cases of libel, slander, malicious prosecution, false imprisonment, seduction, breach of promise of marriage, and cases in which fraud was alleged. In all other cases neither party could demand a jury trial as of right: the matter was completely within the discretion of the court. The Act of 1939, which is an emergency measure, carries this further by abolishing the list of cases in which a litigant could demand a jury trial. No jury is now used in any civil proceedings in any court, unless the court so orders. Juries in criminal cases are, of course, unaffected by this provision. The Act also provides that when a jury is used, whether in a civil or a criminal case, it is to consist of seven persons instead of the usual twelve.

Provision has also been made for the setting up of special courts to administer criminal justice speedily in any area which should become a theatre of war. These courts are called "War Zone Courts." They are not courts martial, and their procedure will be substantially the same as that of the ordinary criminal courts. Each court consists of a President and two advisory members. The President holds office in the same way as a puisne judge of the High Court, that is to say, during good behaviour, and subject to dismissal only upon an address from both Houses of Parliament. The courts have jurisdiction to try any case which would normally be tried by the High Court, a Court of Assize, a Court of Quarter Sessions, or a Court of Summary Jurisdiction. The War Zone Courts have the same powers of punishment as the "ordinary" criminal courts, but if a person is sentenced to death or to penal servitude for more than seven years, the proceedings of the court must be submitted for review to a special tribunal consisting of three persons who hold or have held high judicial office. An order constituting districts and War Zone Courts has been issued, and a skeleton organization prepared, but the courts would be brought into actual working existence only in the event of an invasion.

There have been other new courts established in Britain in wartime, and the most important of these are the courts established by other members of the United Nations. These courts, which are established under British Acts of Parliament, apply the law of the country concerned, thereby giving full extraterritorial effect to certain codes of these countries. The courts are of two kinds: service courts and maritime courts.

There are in Britain armed forces of many of the United Nations, including countries of the British Commonwealth of Nations, the United States, several refugee governments, and the Fighting French. Obviously, if these armed forces are to operate effectively, they must be provided with the means of enforcing discipline among their members. Under the Visiting Forces (British Commonwealth) Act of 1933, the countries of the British Commonwealth may set up in Britain service courts with jurisdiction over members of their armed forces. These courts apply the law of the country concerned. After the arrival of the refugee governments with their armies, Parliament passed the Allied Forces Act, 1940, which allowed Allied governments to set up service courts in Britain, and provided for the application to these governments of certain provisions of the Visiting Forces (British Commonwealth) Act. The refugee governments have set up service courts under the Allied Forces Act, and so have the Fighting French, although not recognized as a sovereign Power. All these courts apply the military code of the country concerned, and sentences they impose will normally be served in British prisons or detention barracks.

Under a constitutional principle of long standing, the British soldier is subject, in both peace and war, to the jurisdiction of the civil courts as well as to the jurisdiction of the service courts. In practice, serious criminal offenses committed by servicemen are tried in the civil courts, and minor offenses are tried by the service courts. The Allied Forces Act placed the Allied serviceman in the same position as the British. He is subject to the British civil courts as well as to the service courts established by his own country.

The Allied Forces Act was applied to the United States, but then, in August, 1942, Parliament passed the United States of America (Visiting Forces) Act, the effect of which is that members of the United States armed forces, unlike members of the British and Allied armed forces, are not subject to the jurisdiction of the British civil courts.

The other courts established in Britian by members of the United Nations are the maritime courts established under the Allied Powers (Maritime Courts) Act, which came into force on May 22, 1941. With the refugee governments there came to Britain a considerable portion of their merchant fleets. When breaches of discipline or breaches of the criminal law occurred aboard these ships outside territorial waters, there was no court in which the offender could be tried. It was to meet this difficulty that Parliament passed the Allied Powers (Maritime Courts) Act. Under this Act, maritime courts have been set up which apply the law of the country concerned, and also follow their own procedure. The jurisdiction of these courts extends to three types of cases: first, criminal offenses committed on board ships of the Power concerned; secondly, breaches of the merchant shipping law of that Power; and, thirdly, breaches of the mercantile marine conscription law of

that Power. British subjects cannot be tried by these courts. The courts have power to compel witnesses to attend and to punish for contempt. Their decisions can only be challenged in a British court on the ground that the three-fold jurisdiction conferred by the Act has been exceeded. Sentences of imprisonment they impose are normally served in British prisons.

II

During the war of 1914-18, legislation was enacted with the general purpose of relieving the hardship which would have been caused if persons had been permitted to enforce their full contractual rights in the circumstances of a great war. Similar legislation has already been passed in the present war, and has gone far beyond the previous legislation.

At the very beginning of the war Parliament passed the Courts (Emergency Powers) Act, 1939. This Act recognized that under modern conditions of warfare civilians are likely to be as seriously affected as combatants, and so no special privileges are conferred on members of the armed forces as such. In general terms the Act provides that the consent of the appropriate court must be obtained before a judgment for a sum of money can be executed or a security realized. The court can withhold its consent if it is satisfied that the person concerned cannot pay, and that the reason why he cannot pay is directly or indirectly attributable to the war. The protection extends to rent, mortgage interest, or any other type of obligation to pay money. The application of this Act is, however, subject to several limitations. First, the obligation to pay is not determined, nor can the court vary the terms of any contract under this Act. The greatest protection given is a temporary restriction upon enforcement. Secondly, the Act has no application where the action is one of tort. Originally, contracts made since the outbreak of war were excluded from the protection of the Act, but this restriction has since been removed. Thirdly, the courts have held that the Act does not bind the Crown, and consequently no protection is available in respect of taxes.

A special protection has, however, been given to mortgagors of dwelling houses. If the mortgagor is serving in the armed forces, or is mainly dependent upon a person serving in the armed forces, the mortgagee must show that the mortgagor can pay. And if the mortgagor does not appear and is not represented, the court must assume that he is in the armed forces or mainly dependent upon a person in the armed forces.

With regard to procedure, several different courses are available to the plaintiff. Of these the one most frequently used is to serve upon the defendant a notice which simply informs him of the protection given to him by the Act. With this is sent a form of counter-notice which the defendant can fill up and return to the court stating his desire to take advantage of the protection.

This Act remained the most important provision until 1941 when the Liabilities (Wartime Adjustment) Act, 1941, was passed. This is a much bolder measure than the Courts (Emergency Powers) Act. It has two main effects:

First, it provides new official conciliation machinery. This consists of Liabilities Adjustment Officers. Any person can apply to one of these officers for assistance if he is in serious financial difficulties owing to the war. The officer will assist him to make with his creditors an equitable "scheme or arrangement" which will enable him "if he carries on a business, or would, but for war circumstances, carry on a business, to preserve that business or recover it when circumstances permit." If the officer approves a scheme which is assented to by a majority in number and value of the creditors, the scheme can be registered and will then bind all creditors who have notice of it, but any creditor who has not agreed to the scheme can appeal to the court. The functions of the Liabilities Adjustment Officer are thus essentially conciliatory and his powers are very limited.

Secondly, the Act established a new method of liquidating liabilities which cannot be met, without the stigma or publicity of bankruptcy proceedings and without the same disregard for the personal sufferings of the debtor. Any defendant who is financially embarrassed can apply to the court, and in some circumstances creditors can also apply. The court can make (1) a protection order, the effect of which is to impose an immediate stay upon all proceedings against the debtor and to prevent the commencement of any new proceedings against him; (2) an adjustment order by means of which the court has wide powers to adjust the liabilities of the debtor.

The Act expressly provides that in exercising these powers the court is not, as in bankruptcy, to concern itself solely with the amount of property which can be realized; regard is also to be had to the needs of the debtor and his family and particularly to the necessity of preserving his business or other means of livelihood which otherwise might be lost to him.

Neither of these Acts establishes a moratorium. The only provision of this sort is that contained in the Defense (Evacuated Areas) Regulations, 1940. These Regulations were issued on July 10, 1940. The Minister of Home Security can declare an area to be "an evacuated area." When this is done, certain debts owed by persons residing or carrying on business in that area cannot be recovered in any way, regardless of whether the person can pay or not. The effect of these regulations is thus very different from the effect of either of the two pieces of legislation discussed above: the debtor is given a complete defence in any proceedings which may be brought against him in respect of a limited class of obligations including rent, local government taxes, mortgage debts, and sums due for water, gas, electricity or telephone service. The protection only applies where the premises concerned are unoccupied.

# JOHN CHIPMAN GRAY

## SOLDIER, LAWYER AND TEACHER*

By GEORGE R. FARNUM
of Boston
Former Assistant Attorney General of the United States

THE life of John Chipman Gray was not an epic of high dramatic interest. Circumstances placed few hurdles in his path. It was not written in his stars to experience the surging impulse to great and heroic action, nor to feel the torture of a restless soul in the grip of travail and frustration. He was born in Brighton, now a part of Boston, in 1839, into a family of notable culture, assured social position and wealth. He was educated at the Boston Latin School, Harvard College and the Law School. Endowed with a strong physique and a fine mind, and starting with the advantages enumerated, his success was the logical result of quiet and sustained effort, consistent direction and a character which inspired confidence.

On the completion of his law studies in 1862, he enlisted in the Union Armies and served until after the close of the war. While he enrolled as second lieutenant in the Forty-first Massachusetts Infantry and was at one time assigned to the Third Massachusetts Cavalry, his work for the most part was of an administrative character as an aide to General Gordon and as Major and Judge Advocate on the staffs of Generals Foster and Gillmore. Unlike his friend, Oliver Wendell Holmes, who participated in some of the bloodiest engagements of the war and was wounded four times, Gray was only once or twice under fire in what would pass for little more than skirmishes. On the eve of returning to civil life he wrote, "During my army life I have not been lazy, for I can never be comfortable while idle; but my labor has been self-imposed, a sort of busy idleness as my legitimate work has rarely, except during a few brief periods, been such as to demand any steady continuous efforts."

The record of his three years of "busy idleness" has been preserved in the graphic letters he wrote members of his family and his friend, John C. Ropes,—letters which reveal much of his mind and character and contain many striking comments on men and events.

In these days, when military personalities intrigue the public imagination, Gray's firsthand impressions of certain Union Commanders have a timely interest. In late December, 1864, he wrote Ropes of General Sherman, "I have just passed a whole morning in the company of the greatest military genius of the country in the height of his success." He "is the most American looking man I ever saw, tall and lank, not very erect, with hair like thatch, which he rubs up with his hands, a rusty beard trimmed close, a wrinkled face, sharp, prominent red nose, small, bright eyes, coarse red hands; black felt hat slouched over the eyes (he says when he wears anything else the soldiers cry out, as he rides along, 'Hello, the old man has got a new hat.') dirty dickey with the points wilted down, black, old fashioned stock, brown field officer's coat with high collar and no shoulder straps, muddy trousers and one spur. He carries his hands in his pockets, is very awkward in his gait and motions, talks continuously and with immense rapidity, and might sit to *Punch* for the portrait of an ideal Yankee." Incidentally, in Sherman's report of certain operations, Gray is referred to as "a very intelligent officer whose name I have forgotten,"—"a striking tribute," as Holmes put it, "to one who barely had reached manhood from the great Commander at the crowning moment of his success."

Commenting on a report of operations by Halleck, which, he says, shows him "like many of our other generals . . . greatly wanting in self-respect and strength of character," but on the whole as "a man of ability and of sense," he added, however, "but I confess that it does not give me any impression of military genius, or any belief that the war is more likely to come to a successful conclusion under him than if his place were filled by any intelligent, clear headed lawyer, who had devoted some time to the theory of war."

Of Grant, he grudgingly wrote in 1863, his "persistent and successful siege of Vicksburg extorts one's unwilling admiration," but, he hastened to interpolate, "I cannot help questioning the prudence and watchfulness of the man who so nearly lost the battle of Corinth." In January, 1865, he records that he breakfasted with him at City Point. "I was better pleased with his appearance than I expected, but he was silent, hardly speaking a word," adding in another letter, "He is more intelligent in appearance and looks more like a gentleman than his pictures led me to expect." On March 31 he narrates a curious observation, allegedly made by Sherman to an aide, that he "guessed he would go round to see Grant. He was staying so long behind fortifications that he had got fossilized, and he [Sherman] was going to stir him up."

In the generous allowance of time which Gray had from official duties, he applied himself to an educational program of extraordinary scope and

*This is the eighth in a series of biographies of eminent soldier-lawyers written by Mr. Farnum for the JOURNAL.

diversity. This extra-military curriculum included readings in English literature, the classics and the romance languages, the study of theology, history and the natural sciences. Incidentally, the perusal of law texts was not neglected. The requisitions he made on family and friends speak eloquently of these preoccupations—as well as suggest that an occasional hour was spent less austerely. One of the first contains "Two gallons of Whiskey" as the initial item, but ends with "Juvenal in the Oxford Pocket Edition."

In another letter the soldier boy reports to Ropes, "I peg away at Homer fifty lines a day. . . . I have now finished the Odyssey and read nine books in the Iliad," and "have been reading a good deal of St. Paul's Epistles lately." After some doctrinal discussion, admonished by the thought that his views were not entirely orthodox, he is at pains to caution his friend that when any "theological discussion . . . takes place at my house remember to be careful of quoting my opinions." At yet another time he called on his mother for a list of books including Cicero's Orations, Jonathan Edwards on the Will, Mill on Liberty and on Representative Government, and Grote's History of Greece, as well as treatises on Jurisprudence, Evidence, Personal Property and a digest of federal statutes. Of his literary criticisms this morsel must suffice, "I got the Atlantic Monthly and the papers," he informed Ropes, commenting, "James Lowell's poem reads as if written in English first and then translated into Yankee afterwards, and therefore like all translations is flat and tame."

After Appomattox, Gray wrote his mother, "I suppose I shall return and open a law office in Boston, because there is nothing else for me to do, though I cannot say I hail the prospect with especial interest." In spite of his lack of enthusiasm, however, back to Boston he came to form a law association with Ropes, and to gain a reputation as an able lawyer and a great law teacher and legal author.

In 1869 he was appointed to the faculty of the Harvard Law School. With the coming of Dean Langdell the following year, and the inauguration of the case system of instruction, a new era began at the school. Langdell found in Gray an able and loyal supporter in his battle against those who opposed his innovation as a heresy in legal education. While he taught from first to last a wide range of subjects, it was as a teacher of property that he rose to acknowledged mastery. Gray's voluminous set of Cases on Property was a pioneer work and quickly became a classic. In a letter to his last class, which reflected the spirit which animated his teaching and the humility which characterized the man, he wrote, "Property 3 has been a perpetual delight to me, never wearisome. I have always felt that on both sides it was not an attempt to show how much we knew, or how smart we were, but that we were fellow-students trying to get to the bottom of a difficult subject." When ill health forced his retirement after forty-four years of uninterrupted teaching, every then member of the faculty had at some time studied in his classes. It was characteristic of him that he refused to abandon entirely practice for a teaching career. His great capacity for work enabled him to unite the two, and, as a result, to balance the exposition to students of theoretical ideas with experience in their application to the practical affairs of men.

As the long day was drawing to a close and the shadows were beginning to fall, in a reminiscent mood he wrote a friend, "Some fifty years ago I determined that I would do two things: first, write a book on the rule against perpetuities, which should be a model text-book; and secondly, write something on analytical jurisprudence." He did them both. Holmes described the former as "a quiet masterpiece that stands on an equal footing with the most famous works of the great English writers upon property law." Of the latter the same competent critic declared, "His last little book on The Nature and Sources of Law is worthy of the German professors who might seem to have made that theme their private domain," but, as he added, "Unlike much German work, instead of pedantry, it is written with the light touch and humor of a man of the world." Another outstanding book in the little series which has been described as "a by-product of his teaching" was Restraints on Alienation.

Perhaps it can be asserted of him, what Professor Holdsworth said of Sir Frederick Pollock, "The literary quality of his work is due to the extent and variety of his learning in many other subjects besides law." William Caleb Loring, late Justice of the Massachusetts Supreme Judicial Court, once counseled the bar, "Take down the second edition of his Restraints on Alienation and read the preface. That will give you an idea of his force and style." Incidentally, it was in this preface that he wrote his memorable denunciation of the spendthrift trust and characterized his book as "my modest task" of showing that such devices "have no place in the system of the Common Law." He added, "But I am no prophet, and certainly do not mean to deny that they may be in entire harmony with the Social Code of the next century. Dirt is only matter out of place; and what is a blot on the escutcheon of the Common Law may be a jewel in the crown of the Social Republic."

Gray was a wise man and a scholar of extraordinary range of intellectual interests. The quiet and intense passion for knowledge, disclosed in his war letters, never deserted him. As he observed late in life, "I may say that I have pursued at eve what I pursued at morn." It was said of him as of Dr. Johnson, that he was "born to grapple with whole libraries."

When Gray died in 1915 Professor Samuel Williston wrote, "There passed from among us a man whose type has always been rare, and is growing rarer." A quarter of a century has elapsed since that judgment was rendered. I doubt if, on reconsideration, any court of appeals of instructed opinion would undertake to revise it.

# BOOK REVIEWS

*Administrative Adjudication in the State of New York*, by Robert M. Benjamin. 1942. Published by the State of New York. Pp. 369. While my opinion is based only on personal observations and conversations, I am convinced that the author of a recent review of this report is mistaken in stating that "those who still decry the administrative process are relicts of a battle now being conceded by their more sensible fellows."[1] It seems to me that such decriers, whether sensible or not, are as numerous and unconvinced as ever. Furthermore, as the administrative process squeezes more people every day, its popularity will probably decrease even further. Mr. Benjamin's painstaking and friendly examination of administrative procedure, as it exists in New York, is likely therefore to be of continuing interest and usefulness.

Mr. Benjamin has not only made a thorough study of the court decisions, statutes, and the actual workings of administrative agencies, but he has also shown a sympathetic understanding of the feelings of those who must deal with such agencies. For example, he has put his finger on the underlying reason behind much of the criticism of administrative action:

"On the part of the administrator there must be not merely an intention to do justice, but an appreciation that justice is only half done if the person dealt with cannot recognize it. To this end procedure may contribute almost as much as the right substantive result."[2]

As Mr. Benjamin observes, the percentage of cases in which persons affected seek judicial review is relatively small.[3] The major explanation of this fact is that in most instances it is felt that the result reached is correct. Nevertheless, a procedure which grates on the sensibilities of ordinary persons to the extent that it seems plainly unfair will cause resentment which cannot be measured in terms of the number of cases taken to court. Administrators will do well to remember the author's admonition to strive constantly to abide by those "standards of fair play (which) have been developed over the course of centuries under the protection of the courts of England and America."[4]

On the other hand, ardent would-be reformers should read this report before undertaking to draw a code of procedure for administrative agencies. Even a casual consideration of the almost infinite variety of problems handled by such agencies[5] is bound to have a sobering effect. As with the courts, reforms in procedure can usually be more effectively accomplished from within than by new laws imposed by the legislature.[6] On the whole, the author concludes that New York may take merited satisfaction in its system of administrative adjudication.[7]

Finally, I must confess that I was startled by Mr. Benjamin's recommendation that a new division in the Executive Department, to be known as the Division of Administrative Procedure, should be established.[8] How the administrative brood has grown when another bureau is needed to keep all the rest of the bureaus straight!

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1. *See* Jaffe, *Administrative Procedure Re-examined: the Benjamin Report*, 56 Harv. L. Rev. 704, 705 (1943).
2. P. 10.
3. P. 15.
4. P. 12.
5. *See* partial list p. 13.
6. P. 11.
7. P. 369.
8. P. 18.

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*Democracy, Efficiency, Stability: An Appraisal of American Government*, by Arthur C. Millspaugh. 1942. Washington, D. C.: The Brookings Institution. Pp. 522. This book announces its aims in the following language:

> The present study aims, by setting forth the facts and trends that are deemed significant, to indicate the situation of government in America from the standpoint of its democracy, its efficiency, and its stability. In short, where are we now? How have we got here? Are we reaching or falling short of our goals? Where do we go from here? (Introduction, p.4)

The author is of the opinion (p.6) that—

> . . . the study of government necessarily includes within its scope: the political capacity of individuals, political philosophies and attitudes, social organization, social action, individual motivations, and leadership. . . .
>
> . . . no progress whatever can be made toward solving political problems without frank and understanding recognition of economic problems. . . .
>
> History does not repeat itself, and trends are not necessarily conclusive; . . . to know how government acted yesterday helps us to understand how it is acting today and how it may act tomorrow.

He adds (p.10):

> . . . The book is divided into three parts. The first, entitled "Evolution and Experience," surveys American government in process of development from 1787 to 1929, the factors that acted upon it, and the problems that were presented to it and revealed by it. The second part, called "The Latest Time of Test," sketches in somewhat more detail the governmental situation with respect to democracy, efficiency and stability from 1929 to the present day. Part III summarizes the discussion and indicates so far as possible the conclusions and implications that can be drawn from our political experiment.

It is disappointing that—

> . . . for the recovery or preservation of governmental health, the author has no final prescription to offer. He is concerned primarily with diagnosis.

The preface (p.vi) concedes that many may think the volume too long and will dispense with reading Part I and passing rapidly over Part II. The reviewer is in accord with this suggestion, as, if the diagnosis is not too elaborate for the patient, perusal will add a fourth to the "cys" and "ity": i.e., "debility" for the reader. Much in these parts is known and is recounted in a somewhat dry, repetitive and monotonous style; as, for example, the story of President Roosevelt's attack on the United States Supreme Court (pp. 396 *et seq.*). The adverse criticism (pp. 328-40) of the party system of government in this country is reiterated (p. 448) under the caption, *"The party system, though indispensable, is partly ineffective, partly perverted,"* and (pp. 450-465) under the heading *"The party system is inadequate and is largely supplanted by pressure groups."* There is a reference (p.287) to the removal of William E. Humphrey from the Federal Trade Commission and of Arthur E. Morgan from the TVA. Strangely, however, the court sequences of these removals (295 U. S. 622, *Humphrey's Executor*) and 115 F. (2d) 990, 6th Cir., cert. denied, 312 U. S. 701, *Morgan*) are not cited or mentioned.

Notwithstanding what has happened since so shrewd an observer as James Bryce, writing *Modern Democracies* in 1921, prophesied "the universal acceptance of democracy as the normal and natural form of government . . ." and, at that time, truly stated, "Men have almost ceased to study its phenomena because these now seem to have become a part of the established order of things," the present author details certain factors favoring, and is hopeful of, the persistence of democracy in the United States, and finds (p.507):

> The decrease of political corruption in its cruder aspects, the freedom and fairness of election procedure,* and the maintenance of liberty of opinion are to be counted as very considerable assets.
>
> Especially encouraging is the improvement of municipal organization and administration since 1900. Experiments in this field have been so numerous, so intelligently studied, and so revealing that eventually trends in city government may suggest, if not determine, some of the main features of state and federal governments.

Of the "re-created" United States Supreme Court (p.401), the analyst notes (p.403):

> When further change comes in economic and social conditions, in public opinion and in governmental policies, the present "liberal" majority may prove as obstructive as its "reactionary" predecessor.
>
> As a counterweight to the usual argument that the transfer in effect of greater responsibility to Congress for constitutional interpretation may conceivably have a sobering effect on that body, the researcher drops into the pan that it "would seem as likely to intensify group pressures on the lawmakers, encourage political opportunism in legislation, and lower the quality and efficacy of public policy," and adds:
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> . . . The question arises, however, whether it would not have been more logical in this instance from the standpoint of democracy and more fruitful in results to have attempted a solution through the amending process. To be sure, the process is difficult: but if government is being "planned" and if the idea is to "make democracy work," why should not an attempt be made to make the process of amendment more democratic and more efficient?

This is the author's sole and oblique criticism of what, to many, seems the most unfortunate activity of the 'reconstructed membership' of the Supreme Court, namely legislating, by strained interpretation of laws, so as to make them read what the justices would like to have them mean.

The lawyer, confronted with a drumlin of home work, should not, in the interest of conservation of resources, put this compilation too near the top of the mound.

MURRAY SEASONGOOD

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*Sir John Fortescue De Laudibus Legum Anglie.* Edited and Translated with Introduction and Notes by S. B. Chrimes. 1942. Cambridge, (Eng.): The University Press; New York: The Macmillan Co. Pp. CXIV, 235.—When in 1461 the Lancastrian King of England, Henry VI, was defeated by the Yorkists and forced to surrender his throne to Edward IV, he fled to Scotland and took with him Margaret, his Queen, their son, Prince Edward, and, among various nobles and gentlemen, Sir John Fortescue, his Chief Justice of the Court of King's Bench. Shortly after their arrival in Scotland, Henry made Fortescue his Chancellor and permitted him in 1463 to accompany the Queen and Prince Edward to France where, for a number of years, they lived in exile. It was probably about 1470 when Lancastrian hopes of restoration were brightest that the aged Chancellor, still in exile with the Prince, wrote a little treatise on the laws of England for the edification of that young man. When in later years this book was published it was called *De Laudibus Legum Anglie.*

Fortescue's intention is to show the Prince, whom he expects to rule England in succession to his father, the advantages of English law over Roman law, with which he daily came into contact during these impressionable years while in exile (Prince Edward was born in 1453 and died in 1471). To make his subject as clear and simple as possible Sir John places it in the frame of a dialogue between the Prince and the Chancellor. Having at the outset convinced his pupil of the advantage of studying the laws of his country, he declares that English law is superior to the civil law practised in France. The Chancellor then expounds on the superiority of the parliamentary limited monarchy of England over the absolute monarchies of other countries. He now turns to legal procedure and launches into praise of the English jury system as a method of proof in contrast to witnesses and torture employed in France. Fortescue has much to say about the jury and shows how the sound economic and social conditions in England have made it easy to find suitable

*To those who have had disagreeable experiences with election procedure, the above characterization of it will appear to partake of Walt Whitman's "bouncing optimism."

jurymen there, while the opposite conditions in France make it impossible to obtain a personnel sufficiently trustworthy for such duties. In a number of other ways the Chancellor compares English and Roman law, such as legitimation by subsequent matrimony, male in contrast to female succession, and the law of wardship. When the Prince asks why so fine a law as that of England is not taught at the universities of Oxford and Cambridge, Fortescue gives a weak excuse and launches into a eulogy and description of education given at the Inns of Court and Chancery, of the degree of serjeant-at-law, and of the dignity of a royal justice. Finally the learned mentor of Prince Edward satisfies him that the delays in English law are not serious and cause far less harm in England than do those in Roman law in France.

Such is the treatise which Dr. Chrimes has edited. His is the seventh edition and twenty-first reprinting since the book was first published in 1545-46. Since Lord Clermont edited Fortescue's masterpiece in 1869 the requirements of present-day scholarship have become so exacting that we welcome this final edition of the *De Laudibus* which has been so "beautifully edited with an elaborate apparatus" by Dr. Chrimes. His translation is suited to the Latin text and at the same time reads most smoothly. His scholarly notes are not only enlightening but also frequently entertaining. And his preface gives us a sketch of Fortescue's life, a description and comparison of the manuscripts of the *De Laudibus* he has employed, and an evaluation of Fortescue and his treatise. There he tells us that this is the first book about English law written by a lawyer for laymen (Dr. Chrimes might better have used this word employed by Holdsworth than his own rather confusing "unlearned brethren"). For the first time the English monarchy is depicted as limited by the will of Parliament as well as by divine and moral law. But more significant in this day and age, Fortescue was the first Englishman to perceive "that the causes of national differences in legal and constitutional institutions must be sought in underlying differences of economic and social conditions." Dr. Chrimes recognizes, of course, that Sir John's little treatise is not perfect. The old Chancellor let the Prince see only the white side of the laws and legal practices of England. He described to him how beautifully they worked in theory and failed to say anything about how they actually worked in practice. We know how the common law was broken, flouted, and twisted in that turbulent fifteenth century. And Henry VI's Chief Justice could not have been totally blind to all this.

Dr. Chrimes's edition of Sir John Fortescue's *De Laudibus Legum Anglie* is introduced to the reader by a lengthy general preface from the pen of Professor H. D. Hazeltine, the editor of the Cambridge Studies in English Legal History in which series this work takes a prominent place. Professor Hazeltine writes most learnedly on Sir John Fortescue and his colleague on the Common Bench, Chief Justice Sir Thomas Littleton. Both these fifteenth century jurists, particularly Fortescue, hold an eminent position among the great galaxy of English legal luminaries, and their writings furnish an invaluable link between the work of Glanvill and Bracton in the twelfth and thirteenth centuries and that of Coke, Selden, and others in the seventeenth. It is unfortunate, but perhaps inevitable, that at times Professor Hazeltine has skimmed the cream for Dr. Chrimes in evaluating Fortescue and his work. But generally the two prefaces supplement each other and the erudition of the one enriches the learning and scholarship of the other.

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*Compendium on Unauthorized Practice of the Law.* 1942. American Bar Association. Pp. 122 and index.—This *Compendium,* issued under the auspices of the Standing Committee of the American Bar Association on Unauthorized Practice of Law, brings to date a collection of decisions covering the unauthorized practice of law throughout the country. The fact that it is edited by the distinguished chairman of the committee, Mr. Edwin M. Otterbourg, is sufficient guaranty that the *Compendium* is thorough and complete. To those who are interested in the unauthorized practice of law and the decisions governing the same, the volume is indispensable.

There are also contained various statements of agreements made by the American Bar Association committee with certain lay groups. Among these is a statement of principles, "Relative to Realtors," which was adopted at Memphis, Tennessee, on May 5, 1942. This statement has already created considerable debate. The writer of this comment cannot refrain from making a few observations as to that portion of the statement which purports to permit the use of legal forms by realtors.

However jurists may differ as to the proper definition of the word "law," and however frequently it may be stated that law is not logic, it nevertheless must be conceded that the conveyance and interchange of thought should have a rational basis.

This writer assumes that the public policy of the various states and the federal government, as has been expressed by the legislatures and courts, is that the practice of law should be confined to those of approved skill and competence. Presumably, it is not in the public interest that the unskilled and ignorant should engage in these activities. If this assumption is valid, it would seem not irrational to state that it is valid in all instances. For example, it would follow that an occasional or isolated instance of the practice of law by a layman, or an incidental practice of law, or a practice of law which is subsidiary to some other activity, still comes within the general principle, that any practice of law by a layman is not conducive to the public welfare.

There have been many encroachments on these principles. These probably will go on, just as there have been a great many violations of the criminal code in the past, and perhaps such will continue regardless of the penal statutes.

Daily one hears over the radio various remedies prescribed by laymen for a variety of diseases. It is also common knowledge that the corner druggist will sometimes prescribe a cathartic. It seems to be conceded that even the best cathartic may be deadly where the abdominal difficulties are due to appendicitis or typhoid fever. And yet, in face of these "realities," and the "public support" of the advertised nostrums and of the corner drug store, what would a member of the medical profession think of the officials of the American Medical Association if, on the grounds of expediency and of the great public demand for easy and convenient remedies available to the laity without prescriptions by a physician, the advertising of such remedies would not only be condoned, but approved?

One of the arguments in support of the position whereby the selection by realtors of forms of contract in real estate transactions is countenanced runs somewhat thiswise: Many of our lawyers are in the Army, many will be killed. The attendance in our law schools has dwindled greatly. Therefore, since there are not enough lawyers to go around, laymen should be encouraged to assist in the practice. Taking an analogy again, from the realms of medicine, the public has recently been moved to great admiration for the skill of a pharmacist's mate who successfully performed an appendectomy on a sailor on the high seas. Does this warrant the argument that since a pharmacist's mate successfully performed such an operation without any previous medical or surgical training, or even the proper equipment, that pharmacist's mates should be encouraged to perform appendectomies generally, and that opposition to this by physicians is bad public policy and not in the public interest?

Whether large masses of the public might come to resent a campaign against either quack lawyers or quack doctors can hardly be relevant to the best interests of the community. No responsible body of professional men should tolerate a weakening in this stand, regardless of pressure groups.

CHARLES LEVITON

Chicago

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*S. O. Levinson and the Pact of Paris*, by John A. Stoner. 1943. University of Chicago Press. Pp. 368.—The sub-title of this book is "A Study in the Techniques of Influence," but the story told by Professor Stoner is the story of a one-man show, or campaign, and that man was a cross between a go-getter and a zealous, self-effacing, enthusiastic missionary who could not accept defeat and was not troubled by considerations of consistency or personal pride. Few men could emulate him if they would. Energy, perseverance, determination, willingness to make financial and other sacrifices and to overlook snubs and disappointments, excessive self-confidence and irrepressible optimism—without these qualities Mr. Levinson's technique would not go far in any case.

Mr. Levinson conceived the idea of outlawing war or de-legalizing it as the only effective means of ridding civilization of that terrible scourge. He learned later that Charles Sumner had entertained and eloquently expounded that idea decades before him, but that he had arrived at it independently, there can be no question. He proceeded to interest in the plan personal and political friends, and even strangers whom he respected and deemed influential, and met with considerable success. He had much difficulty in converting Senator Borah, who made promises and failed to keep them, but who eventually became the champion of the idea of outlawry. Harding, Knox, Coolidge, President Eliot, Jacob Schiff, the banker, were among the other men Levinson tried to impress and win over.

How, at last, after many delays, struggles, and setbacks, the so-called Kellogg-Briand Pact of Paris came into being, the whole family of nations adhering to it —some of the statesmen with tongue in cheek; others, like Litvinov, without believing in it; and still others with nullifying reservations—is a matter of record. For Levinson this result was a notable and brilliant triumph, and he received some recognition for his indefatigable labors and sacrifices. To many, however, he remained virtually unknown as the real author of the plan. To these Professor Stoner's detailed and impartial account will come as a revelation.

We know now that the idea was fallacious and unrealistic. The League of Nations, which Levinson supported at first and then fought rather unfairly and intemperately because of his affiliation with the isolationists and irreconcilables, was of course in every way superior and more promising. The pledge to renounce war did not deter the aggressors and did not prevent the Ethiopian war, the Japanese war on China, or the present global war. A pact without sanctions, without provisions for enforcement, is an empty gesture. Without institutions, machinery, organization, war cannot be outlawed save on paper. The pact is dead and buried. The League in some form and under some other name, perhaps, is certain to survive, or civilization is doomed. However, Levinson had other important steps in view and would have worked just as hard for them had he lived longer. He was a sincere friend of peace and a genuine humanitarian.

Borah said that Levinson would be remembered as one of the great Hebrew prophets. He deserves this tribute despite his failure.

VICTOR S. YARROS

*Trouble-Shooter:* The Story of a Northwoods Prosecutor, by Robert Traver. 1943. New York: Viking Press. Pp. 294. This is a vivid book. People are thumbing it casually at book counters, and then buying it because they can't put it down. But for me it was more than that. The characters walked and talked and smelled of the woods of Lake Superior, and I was with them.

The locale is the most thrilling part of the world for me, and I know it so intimately that the thinly disguised names and slightly changed incidents merely whetted my memory. I had known the author in young manhood before he had become a celebrity; I had known his father, who was somewhat less glamorous in real life than in the story; I had known his mother, an intelligent and sweet woman whose gifts were not enhanced by her marriage; I had admired the gay and confident spirit in which the son of that marriage had secured his education in spite of his father; and then I had seen that son walk out of a large Chicago law office and return to the North in response to his heritage from that same father.

There is some fine writing in this first book from a vigorous pen. The courtroom scene, where the convict charged with murder handles his own defense, and wins a spectacular acquittal, would be almost too neat if it were imaginative. But it happened that way. Judge Belden is almost too fine a character to be a country judge. But I can take you up there and let you see his fine gray beard and twinkling eyes, and you will never forget him. And the Finns, and the Italians, and the other members of that post-frontier community are in life exactly like those deft characterizations.

Could I delete what I wished, I would strike out the gutter vocabulary, and the cynicism. Neither is like the author. He isn't that sort of fellow, and I hope that in the future his publishers won't try to sell his books on that basis. He is too fine for that.

CLARENCE B. RANDALL

Chicago

## RECENT PUBLICATIONS

THE MIND AND FAITH OF JUSTICE HOLMES: His Speeches, Essays, Letters and Judicial Opinions, selected and edited with introduction and commentary by Max Lerner. 1943. Boston: Little, Brown and Company. Pp. L, 474. $4.

PHOTOGRAPHIC EVIDENCE: Preparation and Presentation, by Charles C. Scott. 1942. Kansas City, Mo.: Vernon Law Book Co. Pp. xxxii, 922. $15.

THE PERMANENT COURT OF INTERNATIONAL JUSTICE. 1920-1942: A Treatise, by Manley O. Hudson. 1943. New York: The Macmillan Company. Pp. xxiv, 807. $7.

WORLD COURT REPORTS: A Collection of the Judgments, Orders and Opinions of the Permanent Court of International Justice, edited by Manley O. Hudson, Vol. IV, 1936-1942. 1943. Washington, D. C.: Carnegie Endowment for International Peace. Sales Agent: Columbia University Press. Pp. xvi, 513. $2.50.

# ANNUAL MEETING CHICAGO, ILLINOIS

*August 23-26, 1943*

The Sixty-Sixth Annual Meeting of the American Bar Association will be held at Chicago, Illinois, August 23 to 26, 1943. Further information with respect to the meeting will be given in the JOURNAL from time to time.

### Hotel Accommodations

Headquarters—The Drake Hotel

Hotel accommodations, all with private bath, are available, as follows:

| | Single for 1 person | Double (Dbl. bed) 2 persons | Twin-beds for 2 persons | Two-room suites (Parlor and 1 bedroom) |
|---|---|---|---|---|
| AMBASSADOR (State at Goethe) | $5.50 & $6.60 | $7.70–$8.80 | $7.70–$8.80 | $13.20–$16.50 |
| BLACKSTONE (Michigan & 6th St., So.) | 5.50 – 8.50 | | | |
| DRAKE (Michigan & Walton) | 3.50 – 5.00 | 7.00–9.00 | 7.00 to 12.00 | 15.00 to 22.00 |
| EDGEWATER BEACH (5300 Sheridan Road) | 5.50 | 7.70 | 7.70 | 16.50 |
| KNICKERBOCKER (163 E. Walton) | 3.50 – 4.50 | 5.00–6.00 | 6.00 to 8.00 | 12.00–15.00 |
| MARYLAND (900 Rush St.) | 3.00 | 4.50 | 5.00 | |
| MEDINAH CLUB (505 N. Michigan) | 4.00 | | 6.00–7.00 | 8.00–10.00 |
| SHERMAN (Randoph at Clark) | | | 7.70–11.00 | |

### Explanation of Type of Rooms

A single room contains either a single or double bed to be occupied by *one person.* A double room contains a double bed to be occupied by *two persons.*

A twin-bed room contains two beds to be occupied by two persons. A twin-bed room will not be assigned for occupancy by one person.

A parlor suite consists of parlor and communicating bedroom containing double or twin beds. Additional bedrooms may be had in connection with the parlor.

To avoid unnecessary correspondence, members are requested to be specific in making requests for reservation, stating hotel, **first and second choice,** number of rooms required and rate therefor, names of persons who will occupy the same, arrival date and, if possible, definite information as to whether such arrival will be in the morning or evening.

Requests for reservations should be addressed to the Reservation Department, 1140 N. Dearborn Street, Chicago, Illinois.

# LONDON LETTER

THE House of Lords, in a judgment delivered on January 25, 1943, gave a decision in the case of *Perrin* v. *Morgan* ([1943] All. E. R. 187) in which the question arose as to the meaning of the phrase in a will "all moneys of which I die possessed." The testatrix, who died in 1939, left investments consisting of stocks or funds of the United Kingdom and of the Dominions, securities in municipal corporations, and stocks and shares and debentures of companies, to the total value of £32,783, in addition to which there was cash at bankers amounting to £689; dividends received or accrued, £36; rents due prior to her death, £82; income tax repayment due to her, £32; and household goods etc. valued at £62. Her personal property, therefore, amounted to £33,685. In addition the testatrix possessed freeholds at King's Somborne valued at £1,445, and a freehold at Michelmarsh worth £340. The actual terms of the will, which was a home made one, were:—"This is the last will and testament of me Emily Rose Morgan of New Farm, King's Somborne in the county of Southampton, spinster. I give, devise and bequeath to my nephew Leonard Morgan the six cottages called 'Vicarage Terrace' King's Somborne, and to my nephew Charles Burnett Morgan, the eight cottages in Nutcher's Drove, King's Somborne and also two thatched cottages with pasture called 'Knowlton.' I direct that all moneys of which I die possessed of shall be shared by my nephews and nieces now living, namely":—Then follows a list of fourteen names of the said nephews and nieces. She also left a legacy of £500 to a sister Julia Palmer. No mention was made in the will of the freehold at Michelmarsh.

The question raised was whether the words "all moneys" included the whole of the residuary estate of the testatrix, and if not, what parts were included in the bequest. The trial judge held that, on the authorities, the bequest of "all moneys" included dividends and interest received or accrued due to the date of her death; cash at bankers; rents due to the date of her death; the proportion of the rents to the date of her death in respect of property devised to her for life; and any sums recovered by way of repayment of income tax; but did not include any other items of her estate. On this view only about £840 fell to be shared between the nephews and nieces, and the testatrix would thus be taken to have died intestate as to the whole of the rest of her personal estate. The Court of Appeal, though with reluctance, had no other course than to apply the rule of construction by which, owing to previous decisions of courts of coordinate jurisdiction, it was bound, and therefore confirmed this view. Lord Greene, M.R., thus defined the rule:—"The rule is, and it has been laid down on many occasions, that the word 'money' in a will must be construed in what is called the strict sense, unless there is a context which permits of an extended meaning being given to it. The strict sense of 'money' curiously enough—and this is one of the anomalies about this rule—is a sense which has been invented by the courts, and invented, I think, partly in order to get rid of the rigours of the rule which would have existed if the word 'money' had been confined to actual cash — which, no doubt, was the original meaning. That was felt by the courts to be going too far, so they invented a special category which they have called 'money in the strict sense,' which includes money not in the strict sense, because it includes choses in action, such as moneys on drawing account at a bank. The category, however, is closed and we cannot extend the language unless there is a context permitting such a course." In the course of his judgment Lord Greene called attention to the remarkable fact that in applying this rule in previous cases judges have many times observed that they believed themselves to be defeating the intention of the testator, and he expressed the view that the rule "is a blot upon our jurisprudence," but he pointed out that it was open to the House of Lords to reconsider the whole matter.

This the House of Lords has now done, and the following extracts from the opinion expressed by Viscount Simon (Lord Chancellor) clearly indicate the wider meaning which must now be attached to the word "money." He said "In the case of an ordinary English word like 'money,' which is not always employed in the same sense, I can see no possible justification for fixing upon it, as the result of a series of judicial decisions about a series of different wills, a castiron meaning which must not be departed from unless special circumstances exist, with the result that this special meaning must be presumed to be the meaning of every testator in every case, unless the contrary is shown. The word money has several meanings, each of which in appropriate circumstances may be regarded as natural. In its original sense, which is also its narrowest sense, the word means 'coin.' Phrases like 'false money' or 'clipped money' show the original use in English. But the conception very quickly broadens into the equivalent of 'cash' of any sort. The question 'Have you any money in your purse?' refers, presumably to bank notes or treasury notes, as well as to shillings or pence. A further extension would include not only coin and currency in the possession of an individual, but debts owing to him, and cheques which he could pay into his banking account, or postal orders or the like. Again, going further, it is a matter of common speech to refer to one's money in the bank, although in a strict

sense the bank is not holding one's own money and what one possesses is a chose in action representing the right to require the bank to pay out sums held at the call of its customer. Sums on deposit may be included by a further extension. But this is by no means the limit to the senses in which the word 'money' is frequently and quite naturally used in English speech. The statement that I have my money invested on mortgage or in debentures, or in stocks and shares, or in savings certificates is not an illegitimate use of the word 'money,' upon which the courts are bound to frown, though it is a great extension from its original meaning to interpret it as covering securities. The word may be used to cover the whole of an individual's personal property—sometimes, indeed, all of a person's property, whether real or personal. 'What has he done with his money?' may well be an inquiry as to the general contents of a rich man's will."

The Court, in allowing the appeal held that the bequest of all moneys of which the testatrix died possessed included all the net personalty of her estate. The decision, therefore, puts an end to a rule which has been regarded by our courts as established and binding for many generations past, and which is said to be traced back to a pronouncement by Gilbert, C.B., in 1725.

### Powers of Attorney

A bill was introduced in the House of Lords on March 3, 1943, to amend the Evidence and Powers of Attorney Act, 1940. It has for its object the extension of facilities for the taking of oaths and the swearing of affidavits by British subjects, especially members of the forces who are outside the United Kingdom during the war. In the Act of 1940 power was conferred upon officers of the three Services, and on the diplomatic and consular officials of the protecting power, to administer oaths and take affidavits. At that time the United States of America, not being then in the war, was the protecting power, and the Lord Chancellor, on the second reading of the Bill, expressed his gratitude to the diplomatic and consular officials of the United States for the service which they had rendered in securing the necessary testimony from British subjects who were abroad, whether they were serving or were in prisoners' camps. Since the United States has joined us in the war against our common enemies the facilities granted under the 1940 Act are insufficient for present requirements. In fact, there are no facilities at present for administering oaths in prisoners of war camps for non-commissioned officers and other ranks. That used to be done by the good offices of American officials, but the present protecting power, namely Switzerland, finds that its officials are unable to administer oaths or take affidavits. The new Bill, when passed, will, therefore, confer power to administer an oath on the British camp leader in a prisoners of war camp or non-commissioned officers and other ranks, and, on camp leaders in internment camps, for civilians. This power will be by Order made by the Lord Chancellor under the provisions of the new Act. Similar powers will be granted to certain other selected classes of people, such as masters of ships who may be prisoners of war, and officers carrying out certain administrative duties in the Far East. Rules of Court may be made for the deposit or registration of photographic copies of instruments creating powers of attorney, and of any affidavits of due execution required in connection therewith, instead of the originals.

### Emergency Legislation

There has recently been introduced in the House of Lords a Bill to consolidate the various Courts (Emergency Powers) Acts, the object being to put into one Act what is now in five statutes. It will certainly make reference easier to this particular branch of wartime legislation, but the maze is becoming increasingly more difficult to negotiate by those whose constant task it is, and, although the old maxim, *ignorantia juris non excusat*, is still very much alive, there are few who could claim to be conversant with all the legislation which has been passed during the last three years. In addition to numerous statutes there have been more than 7,000 Statutory Rules and Orders passed during the years 1940 to 1942—most of them war measures.

S.

The Temple

## *Lord Hewart, Lord Chief Justice of England*

LORD HEWART, Lord Chief Justice of England between 1922 and 1940, died May 5 at his home in Totteridge, Hertfordshire, at the age of 73. Ill health, which caused his retirement in October, 1940, prevented his realization of a desire to "die in harness." On retirement he was raised from a Baron to a Viscount.

Members of the Association will remember with pleasure the visit of Lord Hewart to the United States in 1927, at which time he addressed the annual meeting in Buffalo, N. Y. Many will recall his observation then, in discussing democracies, to the effect that "How different is the frame of mind if, instead of speaking of the 'grievances' of coal miners, or the 'grievances' of the unemployed, or the 'grievances' of those who cannot find houses to live in, people reflect that, in truth and in fact, it is not only the miners, the workless or the homeless who are in trouble but the State itself, and the whole State, is in trouble in those of its limbs or parts which consist of its miners or its workless or homeless citizens."

Lord Hewart attended public functions of all kinds, and his speeches revealed the same power and the same kindliness and wit which marked his court judgments. He did not allow his high office to prevent his participation in the affairs of the day or his expressing his opinion on matters of State.

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## International Bill of Rights

ELSEWHERE is a brief account of the recent sessions of the American Law Institute at Philadelphia. The matter of special interest at those meetings within the lawyer's field, was the discussion of the objectives of the allied nations after the victory, which now seems more certain and nearer than ever before.

The first of all objectives was recognized by every speaker to be victory over those evil forces which are endeavoring to take by force the wealth of the world, on the arrogant pretence that it should belong to the "superior race."

No race which devotes its energy to theft and destruction or permits its leaders to carry its people along that path, has the right to call itself "superior."

If there was any single note dominant in importance, it was that in the post-war world, restraint should be imposed only on the selfish and lawless forces which plunged the world into its present struggle, and that all other nations should be free to erect such a structure of self-government as they should for themselves determine.

It was understood that the entire discussion was in the nature of a report of progress. None of the sub-committees of the conference made a final recommendation. Enough seems to have been accomplished, however, to justify further deliberate and two-sided consideration of grave questions which will especially challenge the attention of lawyers.

## The Bar and the Law Schools

THE law schools of America are fighting for existence.

Only a few short years ago we seemed faced with "overcrowding" and with the deplorable "economic condition of the bar." All that has been turned upside down.

To say that the ranks of law students have been decimated is understatement. They have flocked to the colors. They are of just the right age and their educational training makes them all the more valuable to the nation. The once crowded classrooms are now almost empty.

When, in God's own time, peace comes—their duty done they will return to the law schools and resume the work which is the ambition of their lives. The schools must be kept open against that time.

While no school can rise beyond the intellectual capacity of its students, the heart of the school is its faculty. A faculty is not just an assemblage of teachers. It is a cohesive organism with traditions and standards and disciplines. Disrupt it and you destroy a body that will take years to reassemble and recreate.

The organized bar has an opportunity and a responsibility to do everything in its power to encourage, support, and assist the devoted members of law school faculties.

The Association has always been deeply concerned in this field. Article I of its Constitution states as its first object "to advance the science of jurisprudence."

Now is the time to implement, back up, and support those words by all action within our combined strength and resources.

## Law Office Organization

IN its May, June, July, and August 1940 issues the JOURNAL published four articles dealing with the general subject of organization, management, and system in a law office. Readers evinced so much interest that the four articles were reprinted, bound together as one pamphlet, and sold at a nominal price.

As this supply of reprints has been practically exhausted the Editorial Board has decided to print more copies but in a new format. The type will be slightly larger and the new pamphlet's size will fit ordinary shelf space in the library.

War conditions have afforded a further illustration of the intrinsic value of a sound plan of organization. All firms, large or small, have lost and will continue to lose their younger men as they enter the armed forces. These junior lawyers leave behind them their clients, the nucleus of the practice they have striven so hard to build up. An efficient system can preserve their practice and take care of their clients. The older men carry on for them. Cost and time records make it easy to arrive at fair adjustments with the younger men when they return or at interim intervals.

As in the Biblical parable, the Marthas seldom stand in the spotlight; but their contribution is necessary and, indeed, fundamental.

The JOURNAL intends, whenever suitable material is available, to pass on to the Association's members ideas and plans that may help a lawyer earn his living and also enable him to render maximum service to his clients.

# A FRIEND BIDS FAREWELL TO DEAN WIGMORE

LAWYERS have already acclaimed the legal accomplishments of John Henry Wigmore. I, who know nothing of the law, can speak of him only as a person.

He was tall and handsome. Being with him was exciting, adventurous, never for a moment dull. He had a zest for life, an infectious enthusiasm. He had the rare gift of bringing out the best in you—a better best than you thought you had.

Anyone reading the list of his accomplishments and activities might easily suppose him to be the sort of man who devoted himself to his work to the exclusion of other interests. On the contrary, he seemed to have more time than most people to indulge a variety of tastes, and to share the personal and even trivial interests of his friends, both young and old.

My memories of the Wigmores are all centered in the library (later transferred to Chicago), at 207 Lake Street, Evanston, where the books written by "Wigmore" took up an extraordinarily long space on one of the many bookshelves, if you happened to notice them, but where his legal accomplishments did not otherwise obtrude themselves. What a romantic room that was to me as a child—and still seems to me now—with its Japanese temple bell at one end, a statue of "The Little Watchman," reproduced from the Capitoline Museum in Rome at the other; and in between, mementoes from all over the world, some grouped on a long table behind the divan where, after 1932, the great gold medal of the American Bar Association also lay. In a high backed chair, with a heavy Roman striped silk shawl hung over its back, Mrs. Wigmore sat after dinner dispensing coffee in small green and gold cups. Dean Wigmore might play on the enormous concert grand piano, or perhaps get down on the floor before the fire to play tiddlywinks with a young guest.

When you were going there to dine, you furbished both your person and your mind. It was worth while to do both. Not only did you want to match as well as you could their own elegance and wit, but nobody was more appreciative of a pretty frock or a good story.

Ever since I have been grown up, I have marvelled at the Wigmores as at no other people I have ever known. When I last saw them in 1939, they seemed to me exactly the same as my earliest childhood memories pictured them nearly forty years ago. The last note I had from Dean Wigmore, which reached me after his death, spoke of meeting an old friend of mine at the polls and chatting with her. I had a letter from her a few days ago. "It was rather a glorious time for him to go," she said. "He was still at a fine place in his work, and he didn't have to grow old and useless." Not old at eighty—no, nor would he ever have been old, if he had lived to be a hundred.

I was glad that we were in Washington, so that we could go to the service for him at Arlington on April 28. When we reached the lovely, red brick, early American, steepled chapel at Fort Meyer, the caisson with its six white horses was already drawn up before the door. Inside, sun was streaming into the white pews through the clear glass windows in the body of the chapel, and through the stained glass windows behind the altar. At the front of the chapel was the table bearing the casket and a folded flag. Flowers were massed about it, and a beautiful green spray, tied with red, white and blue, was before it. The organist played softly, old familiar hymns, while people gathered in the chapel. Presently one could hear the sounds of the military escort forming outside.

Chaplain Magnan, tall and gray-haired, looking distinguished in his vestments, made the simple service a very moving one. At the end of the service, two men in uniform came down the aisle, one to carry the casket and one to carry the flag. As the first one swung around, the sunlight caught the lettering "John Henry Wigmore" and turned it to gold.

By the time we reached the door of the chapel, the coffin was covered with Old Glory, and soon the command for the procession to start in through the Arlington gates. It was a most impressive procession. There was a full platoon of soldiers, led by a fine band playing gloriously; the flags blew out gallantly in the breeze; sun glinted from the harness fittings of the horses, and winding slowly behind, came a long line of cars. "Onward, Christian Soldiers," played the band—and then "Adeste Fidelis," and then after an interval of drumming, "Onward, Christian Soldiers" again, with a different and lovely orchestration. As we neared the grave, a scarlet tanager, as red as one of the stripes of the flag, flew over the road and perched high up in a pine tree.

So smoothly was everything done, that as we walked up the grassy knoll, carpeted with violets, almost miraculously, it seemed, the grave was covered with flowers, and four men in uniform, one at each corner, were holding the flag above it. The Chaplain, now in uniform too, read the last prayers. Just as he ended, the breeze sent a shower of cherry blossom petals cascading down. Then the salute was fired, and a bugler took the chaplain's place to blow taps—slowly—clear, high and sweet—a beautiful ending to a service that was truly a fitting tribute to a great career, a great man, and a great friend.

M. G. B.

# REVIEW OF RECENT SUPREME COURT DECISIONS

By EDGAR BRONSON TOLMAN*

### Freedom of Press and Religion—Licenses—Taxes

**A municipal ordinance which requires the issuance of a license and the payment of a license fee as a prerequisite for the sale or distribution of religious tracts and books by itinerant members of a religious sect, conflicts with the First and Fourteenth Amendments.**

*Murdock v. Commonwealth of Pennsylvania,* 87 L. ed. Adv. Ops. 827; 63 Sup. Ct. Rep. 870; U. S. Law Week 4326. (Nos. 480-487, argued March 10 and 11, 1943; decided May 3, 1943.)

This case disposes in one opinion seven "Jehovah's Witnesses" cases from Pennsylvania. The City of Jeannette has an ordinance some forty years old, which may be briefly summarized as follows: it forbids solicitation of orders for merchandise of any kind or the delivery of articles ordered, unless a license is obtained and a fee is paid of $1.50 per day, $7 per week, $12 for two weeks or $20 for three weeks. The ordinance provides that it shall not apply to persons selling by sample to merchants or dealers in that city. The eight defendants were among those who went about from door to door in Jeannette distributing literature and soliciting the residents to "purchase" certain religious books and pamphlets. In connection with those activities, they carried a phonograph on which they played a record expounding certain of their religious views, but none of them obtained a license. They were arrested for breach of the city ordinance, were convicted and fined for violation thereof. On appeal the Superior Court of Pennsylvania affirmed the defendants' contention that the ordinance deprived them of freedom of speech, press and religion. The Supreme Court of Pennsylvania denied leave to appeal. The Supreme Court of the United States granted certiorari and reversed the state supreme court. Mr. Justice DOUGLAS delivered the opinion of the Court. After stating the record facts, he says:

> The First Amendment, which the Fourteenth makes applicable to the states, declares that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press . . ." It could hardly be denied that a tax laid specifically on the exercise of those freedoms would be unconstitutional. Yet the license tax imposed by this ordinance is in substance just that.
>
> Petitioners spread their interpretations of the Bible and their religious beliefs largely through the hand distribution of literature by full or part time workers. They claim to follow the example of Paul, teaching "publickly, and from house to house." Acts 20:20. They take literally the mandate of the Scriptures, "Go ye into all the world, and preach the gospel to every creature." Mark 16:15. In doing so they believe that they are obeying a commandment of God.

Mr. Justice DOUGLAS says that "the hand distribution of religious tracts is an age-old form of missionary evangelism—as old as the history of printing presses" and traces its history and the character of its activities. He declares that it is more than preaching and more than a distribution of literature, that it is a combination of both and that its purpose is as evangelical as the revival meeting. He says:

> This form of religious activity occupies the same high estate under the First Amendment as do worship in the churches and preaching from the pulpits. It has the same claim to protection as the more orthodox and conventional exercises of religion. It also has the same claim as the others to the guarantees of freedom of speech and freedom of the press.
>
> The integrity of this conduct or behavior as a religious practice has not been challenged. Nor do we have presented any question as to the sincerity of petitioners in their religious beliefs and practices, however misguided they may be thought to be. Moreover, we do not intimate or suggest in respecting their sincerity that any conduct can be made a religious rite and by the zeal of the practitioners swept into the First Amendment. *Reynolds* v. *United States,* 98 U. S. 145, 161-167, and *Davis* v. *Beason,* 133 U. S. 333, denied any such claim to the practice of polygamy and bigamy. Other claims may well arise which deserve the same fate. We only hold that spreading one's religious beliefs or preaching the Gospel through distribution of religious literature and through personal visitations is an age-old type of evangelism with as high a claim to constitutional protection as the more orthodox types. The manner in which it is practiced at times gives rise to special problems with which the police power of the states is competent to deal.

It is pointed out that the Court is here concerned merely with one narrow issue, that there is presented for decision no question concerning punishment for any alleged unlawful act during the solicitation nor any question as to the validity of a registration system for colporteurs and other solicitors. The single question is declared to be the constitutionality of an ordinance which as construed and applied requires religious colporteurs to pay a license tax as a condition to the pursuit of their activities.

The justification for the exaction of a license tax was based on the fact that the religious literature is distributed with a solicitation of funds. Mr. Justice DOUGLAS reviews what was said in *Jones v. Opelika* and in *Jamison v. Texas* and declares that the mere fact that the religious literature is "sold" by itinerant preachers rather than "donated" does not transform evangelism into a commercial enterprise. This contention is fully discussed, the decisions of various state courts are cited and Mr. Justice DOUGLAS says:

*Assisted by JAMES L. HOMIRE.

> We do not mean to say that religious groups and the press are free from all financial burdens of government. . . . We have here something quite different, for example, from a tax on the income of one who engages in religious activities or a tax on property used or employed in connection with those activities. It is one thing to impose a tax on the income or property of a preacher. It is quite another thing to exact a tax from him for the privilege of delivering a sermon. The tax imposed by the City of Jeannette is a flat license tax, the payment of which is a condition of the exercise of these constitutional privileges. The power to tax the exercise of a privilege is the power to control or suppress its enjoyment. . . . Those who can tax the exercise of this religious practice can make its exercise so costly as to deprive it of the resources necessary for its maintenance. Those who can tax the privilege of engaging in this form of missionary evangelism can close its doors to all those who do not have a full purse. Spreading religious beliefs in this ancient and honorable manner would thus be denied the needy. Those who can deprive religious groups of their colporteurs can take from them a part of the vital power of the press which has survived from the Reformation.

It was also contended below "that the fact that the license tax can suppress or control this activity is unimportant if it does not do so." That contention was rejected and it was declared that "a state may not impose a charge for the enjoyment of a right granted by the federal constitution." The opinion quoted from a recent decision of the Supreme Court of Illinois in a "Jehovah's Witnesses" case the following statement: "a person cannot be compelled to purchase, through a license fee or a license tax, the privilege freely granted by the constitution."

It had been contended that since the ordinance was nondiscriminatory, it was valid. That contention was also rejected with the statement that "Such equality in treatment does not save the ordinance. Freedom of press, freedom of speech, freedom of religion are in a preferred position."

The opinion deals with another question which Mr. Justice DOUGLAS states and disposes of as follows:

> It is claimed, however, that the ultimate question in determining the constitutionality of this license tax is whether the state has given something for which it can ask a return. That principle has wide applicability. . . . But it is quite irrelevant here. This tax is not a charge for the enjoyment of a privilege or benefit bestowed by the state. The privilege in question exists apart from state authority. It is guaranteed the people by the federal constitution.

Emphasis was placed by the state on the kind of literature which was being distributed. It was declared to be "provocative, abusive, and ill-mannered" and that it assaulted the "cherished faiths of many of us." Mr. Justice DOUGLAS rejects that justification of the tax, and says:

> Plainly a community may not suppress, or the state tax, the dissemination of views because they are unpopular, annoying or distasteful. If that device were ever sanctioned, there would have been forged a ready instrument for the suppression of the faith which any minority cherishes but which does not happen to be in favor. That would be a complete repudiation of the philosophy of the Bill of Rights.

In closing the opinion, Mr. Justice DOUGLAS says:

> The judgment in *Jones* v. *Opelika* has this day been vacated. Freed from that controlling precedent, we can restore to their high, constitutional position the liberties of itinerant evangelists who disseminate their religious beliefs and the tenets of their faith through distribution of literature. The judgments are reversed and the causes are remanded to the Pennsylvania Superior Court for proceedings not inconsistent with this opinion.

Mr. Justice REED filed a dissenting opinion. An understanding of the grounds of his dissent will be aided by reference to the particulars in which he declares that he does not dissent. He says:

> This dissent does not express, directly or by inference, any conclusion as to the constitutional rights of state or federal governments to place a privilege tax upon the soliciting of a free-will contribution for religious purposes. Petitioners suggest that their books and pamphlets are not sold but are given either without price or in appreciation of the recipient's gift for the furtherance of the work of the witnesses. The pittance sought, as well as the practice of leaving books with poor people without cost, gives strength to this argument. In our judgment, however, the plan of national distribution by the Watch Tower Bible & Tract Society, with its wholesale prices of five or twenty cents per copy for books, delivered to the public by the Witnesses at twenty-five cents per copy, justifies the characterization of the transaction as a sale by all the state courts. The evidence is conclusive that the Witnesses normally approach a prospect with an offer of a book for twenty-five cents. Sometimes, apparently rarely, a book is left with a prospect without payment. The quid pro quo is demanded. If the profit was greater, twenty cents or even one dollar, no difference in principle would emerge. The Witness sells books to raise money for propagandising his faith, just as other religious groups might sponsor bazaars or peddle tickets to church suppers or sell Bibles or prayer books for the same object. However high the purpose or noble the aims of the Witness, the transaction has been found by the state courts to be a sale under their ordinances and, though our doubt was greater than it is, the state's conclusion would influence us to follow its determination.
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> The real contention of the Witnesses is that there can be no taxation of the occupation of selling books and pamphlets because to do so would be contrary to the due process clause of the Fourteenth Amendment, which now is held to have drawn the contents of the First Amendment into the category of individual rights protected from state deprivation. . . . Since the publications teach a religion which conforms to our standards of legality, it is urged that these ordinances prohibit the free exercise of religion and abridge the freedom of speech and of the press.

Mr. Justice REED then sets out the language of the First Amendment and states its legislative history, the course of its debate in the Constitutional Convention and reviews the decisions of the Court on this phase of its interpretation. He says:

> Is there anything in the decisions of this Court which indicates that church or press is free from the financial burdens of government? We find nothing. Religious

societies depend for their exemptions from taxation upon state constitutions or general statutes, not upon the Federal Constitution. . . . This Court has held that the chief purpose of the free press guarantee was to prevent previous restraints upon publication. . . . In *Grosjean* v. *American Press Co.*, 297 U. S. 233, 250, it was said that the predominant purpose was to preserve "an untrammeled press as a vital source of public information."

Cases in which taxes have been sustained upon the properties of churches and newspapers are reviewed and Mr. Justice REED says:

Can it be that the Constitution permits a tax on the printing presses and the gross income of a metropolitan newspaper but denies the right to lay an occupational tax on the distributors of the same papers? Does the exemption apply to booksellers or distributors of magazines or only to religious publications? And if the latter to what distributors? Or to what books? Or is this Court saying that a religious practice of book distribution is free from taxation because a state cannot prohibit the "free exercise thereof" and a newspaper is subject to the same tax even though the same Constitutional Amendment says the state cannot abridge the freedom of the press? It has never been thought before that freedom from taxation was a perquisite attaching to the privileges of the First Amendment. The national Government grants exemptions to ministers and churches because it wishes to do so, not because the Constitution compels. . . . Where camp meetings or revivals charge admissions, a federal tax would apply, if Congress had not granted freedom from the exaction.

Referring to that part of the prevailing opinion which declares that the distribution of religious tracts is a combination of preaching and distribution of religious literature, Mr. Justice REED says:

The rites which are protected by the First Amendment are in essence spiritual—prayer, mass, sermons, sacrament—not sales of religious goods. The card furnished each Witness to identify him as an ordained minister does not go so far as to say the sale is a rite. It states only that the Witnesses worship by exhibiting to people "the message of said gospel in printed form, such as the Bible, books, booklets and magazines, and thus afford the people the opportunity of learning of God's gracious provision for them." On the back of the card appears: "You may contribute twenty five cents to the Lord's work and receive a copy of this beautiful book." The sale of these religious books has, we think, relation to their religious exercises, similar to the "information march," said by the Witnesses to be one of their "ways of worship" and by this Court to be subject to regulation by license in *Cox* v. *New Hampshire*, 312 U. S. 569, 572, 573, 576.

The attempted analogy in the dissenting opinion in *Jones* v. *Opelika*, 316 U. S. 584, 609, 611, which now becomes the decision of this Court, between the forbidden burden of a state tax for the privilege of engaging in interstate commerce and a state tax on the privilege of engaging in the distribution of religious literature is wholly irrelevant. A state tax on the privilege of engaging in interstate commerce is held invalid because the regulation of commerce between the states has been delegated to the Federal Government. This grant includes the necessary means to carry the grant into effect and forbids state burdens without Congressional consent. It is not the power to tax interstate commerce which is interdicted but the exercise of that power by an unauthorized sovereign, the individual state.

The limitations of the Constitution are not maxims of social wisdom but definite controls on the legislative process. We are dealing with power, not its abuse. This late withdrawal of the power of taxation over the distribution activities of those covered by the First Amendment fixes what seems to us an unfortunate principle of tax exemption, capable of indefinite extension. We had thought that such an exemption required a clear and certain grant. This we do not find in the language of the First and Fourteenth Amendment. We are therefore of the opinion the judgments below should be affirmed.

Mr. Justice ROBERTS, Mr. Justice FRANKFURTER, and Mr. Justice JACKSON join in this dissent. Mr. Justice JACKSON has stated additional reasons for dissent in his concurrence in *Douglas* v. *Jeannette*, decided this day.

Mr. Justice FRANKFURTER filed a separate dissent. The position taken by him appears in the following quotations:

While I wholly agree with the views expressed by Mr. Justice REED, the controversy is of such a nature as to lead me to add a few words.

A tax can be a means for raising revenue, or a device for regulating conduct, or both. Challenge to the constitutional validity of a tax measure requires that it be analyzed and judged in all its aspects. We must therefore distinguish between the questions that are before us in these cases and those that are not. It is altogether incorrect to say that the question here is whether a state can limit the free exercise of religion by imposing burdensome taxes.

• • •

It cannot be said that the petitioners are constitutionally exempt from taxation merely because they may be engaged in religious activities or because such activities may constitute an exercise of a constitutional right. It will hardly be contended, for example, that a tax upon the income of a clergyman would violate the Bill of Rights, even though the tax is ultimately borne by the members of his church.

• • •

Nor can a tax be invalidated merely because it falls upon activities which constitute an exercise of a constitutional right. The First Amendment of course protects the right to publish a newspaper or a magazine or a book. But the crucial question is—how much protection does the Amendment give, and against what is the right protected? It is certainly true that the protection afforded the freedom of the press by the First Amendment does not include exemption from all taxation. A tax upon newspaper publishing is not invalid simply because it falls upon the exercise of a constitutional right.

• • •

The power to tax, like all powers of government, legislative, executive and judicial alike, can be abused or perverted. The power to tax is the power to destroy only in the sense that those who have power can misuse it. Mr. Justice HOLMES disposed of this smooth phrase as a constitutional basis for invalidating taxes when he wrote "The power to tax is not the power to destroy while this Court sits."

Mr. Justice JACKSON filed a dissenting opinion. Here for the first time may be found a single, informative and graphic picture of this strange conflict between the public authorities, who claim the right to protect their

citizens from unwanted intrusion on the seclusion and privacy of their homes, and those who claim the right to extend a campaign of proselyting from house to house and preach their gospel to unwilling hearers. He begins this picture as follows:

> Except the case of *Douglas et al.* v. *Pennsylvania*, all of these cases are decided upon the record of isolated prosecutions in which information is confined to a particular act of offense and to the behavior of an individual offender. Only the *Douglas* record gives a comprehensive story of the broad plan of campaign employed by Jehovah's Witnesses and its full impact on a living community. But the facts of this case are passed over as irrelevant to the theory on which the Court would decide its particular issue. Unless we are to reach judgments as did Plato's men who were chained in a cave so that they saw nothing but shadows we should consider the facts of the *Douglas* case at least as an hypothesis to test the validity of the conclusions in the other cases. This record shows us something of the strings as well as the marionettes. It reveals the problem of those in local authority when the right to proselyte comes in contact with what many people have an idea is their right to be let alone. The Chief Justice says for the Court in *Douglas* that "in view of the decision rendered today in Nos. 480-487, *Murdock et al.* v. *Pennsylvania, supra*, we find no ground for supposing that the intervention of a federal court, in order to secure their constitutional rights, will be either necessary or appropriate," which could hardly be said if the constitutional issues presented by the facts of this case are not settled by the *Murdock* case. The facts of record in the *Douglas* case and their relation to the facts of the other cases seem to me worth recital and consideration if we are realistically to weigh the conflicting claims of rights in the related cases today decided.

He proceeds to describe the extent and character of the "Watch Tower Campaign" instituted by Jehovah's Witnesses in Jeannette, Pennsylvania. A thorough campaign of house-to-house visitation, he says, was carried on by a large number of the Witnesses. In addition to the sale or distribution of books or tracts, a record was played on a phonograph if the householder would listen. Its subject was "Snare and Racket." The character of the record is shown from some excerpts. Among others the record said:

> "Religion is wrong and a snare because it deceives the people, but that does not mean that all who follow religion are willingly bad. Religion is a racket because it has long been used and is still used to extract money from the people upon the theory and promise that the paying over of money to a priest will serve to relieve the party paying from punishment after death and further insure his salvation." This line of attack is taken by the Witnesses generally upon all denominations, especially the Roman Catholic.

The character of the campaign brought many complaints from offended householders and three or four of the Witnesses were arrested. The description of the campaign is continued as follows:

> Thereafter, the "zone servant" in charge of the campaign conferred with the Mayor. He told the Mayor it was their right to carry on the campaign and showed him a decision of the United States Supreme Court, said to have that effect, as proof of it. The Mayor told him that they were at liberty to distribute their literature in the streets of the city and that he would have no objection if they distributed the literature free of charge at the houses, but that the people objected to their attempt to force these sales, and particularly on Sunday. The Mayor asked whether it would not be possible to come on some other day and to distribute the literature without selling it. The zone servant replied that that was contrary to their method of "doing business" and refused. He also told the Mayor that he would bring enough Witnesses into the City of Jeannette to get the job done whether the Mayor liked it or not.
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> * * *
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> On Palm Sunday of 1939, the threat was made good. Over 100 of the Witnesses appeared. They were strangers to the city and arrived in upwards of twenty-five automobiles. The automobiles were parked outside the city limits, and headquarters were set up in a gasoline station with telephone facilities through which the director of the campaign could be notified when trouble occurred. He furnished bonds for the Witnesses as they were arrested. As they began their work, around 9:00 o'clock in the morning, telephone calls began to come in to the Police Headquarters, and complaints in large volume were made all during the day. They exceeded the number that the police could handle, and the Fire Department was called out to assist. The Witnesses called at homes singly and in groups, and some of the homes complained that they were called upon several times. Twenty-one Witnesses were arrested. Only those were arrested where definite proof was obtainable that the literature had been offered for sale or a sale had been made for a price. Three were later discharged for inadequacies in this proof, and eighteen were convicted. The zone servant furnished appeal bonds.

As to the national structure of the Jehovah's Witnesses' movement, the opinion summarizes the evidence as follows:

> At the head of the movement in this country is the Watch Tower Bible & Tract Society, a corporation organized under the laws of Pennsylvania, but having its principal place of business in Brooklyn, N. Y. It prints all pamphlets, manufactures all books, supplies all phonographs and records, and provides other materials for the Witnesses. It "ordains" these Witnesses by furnishing each, on a basis which does not clearly appear, a certificate that he is a minister of the Gospel. Its output is large and its revenues must be considerable. Little is revealed of its affairs.
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> * * *
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> In none of these cases has the assertion been supported by such usual evidence as a balance sheet or an income statement. What its manufacturing costs and revenues are, what salaries or bonuses it pays, what contracts it has for supplies or services we simply do not know. The effort of counsel for Jeannette to obtain information, books and records of the local "companies" of Witnesses engaged in the Jeannette campaign in the trial was met by contradictory statements as to the methods and meaning of such meager accounts as were produced.
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> The publishing output of the Watch Tower corporation is disposed of through converts, some of whom are full-time and some part-time ministers. These are organized into groups or companies under the direction of "zone servants." It is their purpose to carry on in a thorough manner so that every home in the communities in which they work may be regularly visited three or four times a year.

The opinion calls attention to quotations from a representative book sold by the Witnesses. Some of those quotations are as follows:

> The greatest racket ever invented and practiced is that of religion. The most cruel and seductive public enemy is

that which employs religion to carry on the racket, and by which means the people are deceived and the name of Almighty God is reproached. There are numerous systems of religion, but the most subtle, fraudulent and injurious to humankind is that which is generally labeled the "Christian religion," because it has the appearance of a worshipful devotion to the Supreme Being, and thereby easily misleads many honest and sincere persons.

From the book "Religion" the following among other quotations are made:

> God's faithful servants go from house to house to bring the message of the kingdom to those who reside there, omitting none, not even the houses of the Roman Catholic Hierarchy, and there they give witness to the kingdom because they are commanded by the Most High to do so. "They shall enter in at the windows like a thief." They do not loot nor break into the houses, but they set up their phonographs before the doors and windows and send the message of the kingdom right into the houses into the ears of those who might wish to hear; and while those desiring to hear are hearing, some of the "sourpusses" are compelled to hear.

It is said that on another Sunday morning following Lent, the Witnesses appeared by twos and threes carrying cases for books and phonograph and that eight of them were arrested. Of those matters Mr. Justice JACKSON declares in his opinion:

> The day of Armageddon, to which all of this is prelude, is to be a violent and bloody one, for then shall be slain all "demonologists," including most of those who reject the teachings of Jehovah's Witnesses.
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> * * *
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> Such is the activity which it is claimed no public authority can either regulate or tax. This claim is substantially, if not quite, sustained today. I dissent—a disagreement induced in no small part by the facts recited.
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> As individuals many of us would not find this activity seriously objectionable. The subject of the disputes involved may be a matter of indifference to our personal creeds. Moreover, we work in offices affording ample shelter from such importunities and live in homes where we do not personally answer such calls and bear the burden of turning away the unwelcome. But these observations do not hold true for all. The stubborn persistence of the officials of smaller communities in their efforts to regulate this conduct indicates a strongly held conviction that the Court's many decisions in this field are at odds with the realities of life in those communities where the householder himself drops whatever he may be doing to answer the summons to the door and is apt to have positive religious convictions of his own.

On the interpretation of the First Amendment, Mr. Justice JACKSON says:

> In my view the First Amendment assures the broadest tolerable exercise of free speech, free press, and free assembly, not merely for religious purposes, but for political, economic, scientific, news, or informational ends as well. When limits are reached which such communications must observe, can one go farther under the cloak of religious evangelism? Does what is obscene, or commercial, or abusive, or inciting become less so if employed to promote a religious ideology? I had not supposed that the rights of secular and non-religious communications were more narrow or in any way inferior to those of avowed religious groups.
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> It may be asked why then does the First Amendment separately mention free exercise of religion? The history of religious persecution gives the answer. Religion needed specific protection because it was subject to attack from a separate quarter. It was often claimed that one was an heretic and guilty of blasphemy, because he failed to conform in mere belief, or in support of prevailing institutions and theology. It was to assure religious teaching as much freedom as secular discussion, rather than to assure it greater license, that led to its separate statement.
>
> The First Amendment grew out of an experience which taught that society cannot trust the conscience of a majority to keep its religious zeal within the limits that a free society can tolerate. I do not think it any more intended to leave the conscience of a minority to fix its limits. Civil government can not let any group ride rough-shod over others simply because their "consciences" tell them to do so.

Referring to that part of the record which shows the language used in the tracts and books sold and distributed, Mr. Justice JACKSON says:

> Neither can I think it an essential part of freedom that religious differences be aired in language that is obscene, abusive, or inciting to retaliation. We have held that a Jehovah's Witness may not call a public officer a "God damned racketeer" and a "damned Fascist," because that is to use "fighting words," and such are not privileged. How then can the Court today hold it a "high constitutional privilege" to go to homes, including those of devout Catholics on Palm Sunday morning and thrust upon them literature calling their church a "whore" and their faith a "racket"?
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> Nor am I convinced that we can have freedom of religion only by denying the American's deep-seated conviction that his home is a refuge from the pulling and hauling of the market place and the street. For a stranger to corner a man in his home, summon him to the door and put him in the position either of arguing his religion or of ordering one of unknown disposition to leave is a questionable use of religious freedom.

In regard to the *Struther* case, Mr. Justice JACKSON says:

> In these cases local authorities caught between the offended householders and the drive of the Witnesses have been hard put to keep the peace of their communities. They have invoked old ordinances that are crude and clumsy for the purpose. I should think that the singular persistence of the turmoil about Jehovah's Witnesses, one which seems to result from the work of no other sect, would suggest to this Court a thorough examination of their methods to see if they impinge unduly on the rights of others. Instead of that the Court has, in one way after another, tied the hands of all local authority and made the aggressive methods of this group the law of the land.
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> This Court is forever adding new stories to the temples of constitutional law, and the temples have a way of collapsing when one story too many is added. So it was with liberty of contract, which was discredited by being overdone. The Court is adding a new privilege to override the rights of others to what has before been regarded as religious liberty. In so doing it needlessly creates a risk of discrediting a wise provision of our Constitution which protects all—those in homes as well as those out of them—in the peaceful, orderly practice of the religion of their choice but which gives no right to force it upon others.
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> Civil liberties had their origin and must find their ultimate guaranty in the faith of the people. If that faith should be lost, five or nine men in Washington could not long supply its want. Therefore we must do our utmost to make clear and easily understandable the reasons for decid-

ing these cases as we do. Forthright observance of rights presupposes their forthright definition.

I think that the majority has failed in this duty. I therefore dissent in *Murdock* and *Struthers* and concur in the result in *Douglas*.

I join in the opinions of Mr. Justice REED in *Murdock* and *Struthers*, and in that of Mr. Justice FRANKFURTER in *Murdock*.

Mr. Justice FRANKFURTER joins in these views.

The case was argued by Mr. Hayden C. Covington for petitioners and by Mr. Fred B. Tescher for respondents.

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### Federal Jurisdiction to Enjoin Criminal Prosecution

**Federal courts in the exercise of jurisdiction conferred upon them by the Constitution and by Acts of Congress have authority on proper allegation and proof to enjoin criminal prosecution in state courts when persons are deprived of any "rights, privileges and immunities secured by the Constitution and laws" but that authority is to be exercised with great care and judicial discretion and in the absence of a showing of irreparable injury and no adequate remedy available in defense on the trial of the criminal charges the judicial authority of the state should not be interfered with.**

*Douglas et al. v. City of Jeannette (Pa.)*, 87 L. ed. Adv. Ops. 855; 63 Sup. Ct. Rep. 877; U. S. Law Week 4350. (No. 450, argued March 10 and 11, 1943; decided May 3, 1943.)

This is an action brought by certain members of Jehovah's Witnesses on behalf of themselves and all other members of that sect in Pennsylvania and adjoining states, to enjoin the enforcement of the City of Jeannette Ordinance No. 60, involved in the *Murdock* cases, Nos. 480-487.

That ordinance was held in that case, by a five to four decision, to be an unconstitutional abridgment of the guaranties of freedom of speech, press, and religion.

The CHIEF JUSTICE declared that the questions decisive of this case were, "whether the district court has statutory jurisdiction as a federal court to entertain the suit and whether the petitioners have by their pleadings and proof established a cause of action in equity."

The suit is held to arise under the Constitution and laws of the United States, including the Civil Rights Act of 1871. The complaint alleged that in the practice of their religion and in conformity with the teachings of the Bible, Jehovah's Witnesses have for many years made house to house distribution of certain printed books and pamphlets setting forth the Jehovah's Witnesses' interpretation of the teachings of the Bible. Jeannette's Ordinance No. 60 makes it unlawful to carry on those activities without the payment of license taxes. The district court, after trial, held the ordinance invalid in that it deprived citizens of freedom of press and religion guaranteed by the First and Fourteenth Amendments. That court enjoined respondents against enforcement of the ordinance against Jehovah's Witnesses. The Court of Appeals for the Third Circuit sustained the jurisdiction of the district court, but reversed on the merits on the authority of the *Opelika* case, one judge dissenting. Certiorari was granted and the judgment of the Circuit Court of Appeals was affirmed.

The opinion of the Court was delivered by the CHIEF JUSTICE. The jurisdiction of the federal court to hear and decide the question of the constitutional validity of the ordinance was sustained under the Civil Rights Act of April 20, 1871, which provided that every person subjected to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, may have an action at law, in equity or other proper proceeding for redress.

Attention is called to the allegations of the complaint that the municipal authorities under the challenged ordinance had subjected the plaintiffs and other members of Jehovah's Witnesses to deprivation of their rights to freedom of speech, press and religion and sought equitable relief. The opinion quotes and construes the due process clause of the Fourteenth Amendment and its relationship to the rights of freedom of speech, press and religion guaranteed by the First Amendment, and declares that the complaint amply alleges facts to show abridgment by criminal proceedings under the ordinance and sets out controversy which is within the adjudicatory power of the district court.

Notwithstanding the holdings which sustained the authority of the district court, the opinion declares that relief may be granted only after a cause of action in equity is established. Want of equity jurisdiction, while not going to the power of the court to decide the case, may nevertheless in the discretion of the court be objected to on its own motion, especially when its powers are invoked to interfere with threatened criminal prosecutions in a state court. Following out this thesis, the CHIEF JUSTICE says:

> The power reserved to the states under the Constitution to provide for the determination of controversies in their courts may be restricted by federal district courts only in obedience to Congressional legislation in conformity to the Judiciary Article of the Constitution. Congress, by its legislation, has adopted the policy, with certain well defined statutory exceptions, of leaving generally to the state courts the trial of criminal cases arising under state laws, subject to review by this Court of any federal questions involved. Hence, courts of equity in the exercise of their discretionary powers should conform to this policy by refusing to interfere with or embarrass threatened proceedings in state courts save in those exceptional cases which call for the interposition of a court of equity to prevent irreparable injury which is clear and imminent; and equitable remedies infringing this independence of the states—though they might otherwise be given—should be withheld if sought on slight or inconsequential grounds.

After quoting many cases in support of the foregoing statement, the CHIEF JUSTICE says:

> It is a familiar rule that courts of equity do not ordinarily restrain criminal prosecutions. No person is immune from prosecution in good faith for his alleged criminal acts. Its imminence, even though alleged to be in violation of constitutional guaranties, is not a ground for equity relief since the lawfulness or constitutionality of the statute or ordinance on which the prosecution is based may be determined as readily in the criminal case as in a suit for an injunction. . . . Where the threatened prosecution is by state officers for alleged violations of a state law, the state courts are the final arbiters of its meaning and application,

subject only to review by this Court on federal grounds appropriately asserted. Hence the arrest by the federal courts of the processes of the criminal law within the states, and the determination of questions of criminal liability under state law by a federal court of equity, are to be supported only on a showing of danger of irreparable injury "both great and immediate."

It is noted that while the trial court found that the municipal authorities had prosecuted certain of Jehovah's Witnesses charged with distributing the literature described in the complaint without having obtained the license required by the ordinance, and had declared the intention further to enforce it, the court made no finding of irreparable injury to petitioners or others.

The opinion also refers to the showing in the record that before this action was begun convictions had been obtained in the state courts and were then pending on appeal; that it did not appear from the record that the Witnesses had been threatened with any injury other than that incident to every criminal proceeding brought lawfully and in good faith; or that a federal court of equity could rightly afford any protection which the accused could not secure by prompt trial and appeal. The opinion declares that there was no proof and that the court could not presume that the municipal authorities would not acquiesce in the opinion of the Court holding the challenged ordinance unconstitutional as applied to the members of Jehovah's Witnesses.

In the conclusion of his opinion, the CHIEF JUSTICE says:

> Nor is it enough to justify the exercise of the equity jurisdiction in the circumstances of this case that there are numerous members of a class threatened with prosecution for violation of the ordinance. In general the jurisdiction of equity to avoid multiplicity of civil suits at law is restricted to those cases where there would otherwise be some necessity for the maintenance of numerous suits between the same parties involving the same issues of law or fact. It does not ordinarily extend to cases where there are numerous parties and the issues between them and the adverse party—here the state—are not necessarily identical. . . . Far less should a federal court of equity attempt to envisage in advance all the diverse issues which could engage the attention of state courts in prosecutions of Jehovah's Witnesses for violations of the present ordinance, or assume to draw to a federal court the determination of those issues in advance, by a decree saying in what circumstances and conditions the application of the city ordinance will be deemed to abridge freedom of speech and religion.
>
> In any event, an injunction looks to the future. . . . And in view of the decision rendered today in Nos. 480-487, *Murdock et al.* v. *Pennsylvania, supra,* we find no ground for supposing that the intervention of a federal court, in order to secure petitioners' constitutional rights, will be either necessary or appropriate.
>
> For these reasons, establishing the want of equity in the cause, we affirm the judgment of the circuit court of appeals directing that the bill be dismissed.

Mr. Justice JACKSON concurs in the result. The grounds of his concurrence are stated in his separate dissenting opinion in *Murdock v. Pennsylvania.*

The case was argued by Mr. Hayden C. Covington for petitioners and by Mr. Fred B. Tescher for respondents.

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### Freedom of the Press and Religion—Police Power—Regulation of House-to-House Visitation

**A municipal ordinance which forbids persons of religious sects going from door to door for the purpose of selling or distributing religious tracts or inviting attendance at religious meetings is in conflict with the First Amendment of the Constitution as an interference with religious liberty.**

*Martin v. City of Struthers, Ohio,* 87 L. ed. Adv. Ops. 861; 63 Sup. Ct. Rep. 862; U. S. Law Week 4344. (No. 238, argued March 11, 1943; decided May 3, 1943.)

An ordinance of the City of Struthers, Ohio, made it unlawful for any person distributing handbills, circulars or other advertisements to ring the doorbells, sound the door knocker or otherwise summon to the door the inmates of any residence. The ordinance was not directed solely to commercial advertising.

One of Jehovah's Witnesses, espousing its religious cause, went to the homes of strangers and by ringing doorbells or knocking on the doors delivered leaflets to the inmates, and was arrested on a charge of violating the ordinance above referred to. She was tried and convicted in the Mayor's Court and fined $10. On trial the defendant admitted knocking at the door for the purpose of delivering an invitation to attend a religious meeting held by Jehovah's Witnesses, but argued in the state court that the ordinance as construed and applied was beyond the power of the state because in violation of the right of freedom of press and religion as guaranteed by the First and Fourteenth Amendments.

The judgment of conviction was appealed to the Supreme Court of Ohio and the appeal was there dismissed on the ground that no debatable constitutional question was involved. On appeal from that decision in the Supreme Court of the United States, the appeal was dismissed, but on reconsideration the Court concluded that since a constitutional question had been presented to the lower state court, the language of the order of the Supreme Court of Ohio should be construed as an opinion on a constitutional question and the case was reconsidered. The decision of the Supreme Court of Ohio was reversed by the Supreme Court of the United States.

Mr. Justice BLACK delivered the opinion of the Court. In opening the discussion, he says:

> For centuries it has been a common practice in this and other countries for persons not specifically invited to go from home to home and knock on doors or ring doorbells to communicate ideas to the occupants or to invite them to political, religious, or other kinds of public meetings. Whether such visiting shall be permitted has in general been deemed to depend upon the will of the individual master of each household, and not upon the determination of the community. In the instant case, the City of Struthers, Ohio, has attempted to make this decision for all its inhabitants. The question to be decided is whether the City, consistently with the Federal Constitution's guarantee of free speech and press, possesses this power.

Mr. Justice BLACK emphasizes the breadth and scope of the right of freedom of speech and press and reviews the cases holding that it embraced the right to distribute literature. On the other hand, he recognizes that "the peace, good order, and comfort of the community may imperatively require regulation of the time, place and manner of distribution." Applying these two considerations, Mr. Justice BLACK says:

> We are faced in the instant case with the necessity of weighing the conflicting interests of the appellant in the civil rights she claims, as well as the right of the individual householder to determine whether he is willing to receive her message, against the interest of the community which by this ordinance offers to protect the interests of all of its citizens, whether particular citizens want that protection or not. The ordinance does not control anything but the distribution of literature, and in that respect it substitutes the judgment of the community for the judgment of the individual householder.
>
> * * *
>
> Ordinances of the sort now before us may be aimed at the protection of the householders from annoyance, including intrusion upon the hours of rest, and at the prevention of crime. Constant callers, whether selling pots or distributing leaflets, may lessen the peaceful enjoyment of a home as much as a neighborhood glue factory or railroad yard which zoning ordinances may prohibit. In the instant case, for example, it is clear from the record that the householder to whom the appellant gave the leaflet which led to her arrest was more irritated than pleased with her visitor.

It appeared in the record that the city, an industrial community most of whose citizens are engaged in the iron and steel industry, strongly defended its rights to protect its inhabitants, who frequently work nights, so that the casual bell pushers might seriously interfere with the hours of sleep although they called at high noon. The city also advanced the argument that burglars frequently pose as canvassers to spy out the premises and to return later.

Continuing, Mr. Justice BLACK says:

> While door to door distributers of literature may be either a nuisance or a blind for criminal activities, they may also be useful members of society engaged in the dissemination of ideas in accordance with the best tradition of free discussion. The widespread use of this method of communication by many groups espousing various causes attests its major importance. "Pamphlets have proved most effective instruments in the dissemination of opinion. And perhaps the most effective way of bringing them to the notice of individuals is their distribution at the homes of the people." *Schneider v. State*, 308 U. S. 164. Many of our most widely established religious organizations have used this method of disseminating their doctrines, and laboring groups have used it in recruiting their members. The federal government, in its current war bond selling campaign, encourages groups of citizens to distribute advertisements and circulars from house to house. Of course, as every person acquainted with political life knows, door to door campaigning is one of the most accepted techniques of seeking popular support, while the circulation of nominating papers would be greatly handicapped if they could not be taken to the citizens in their homes. Door to door distribution of circulars is essential to the poorly financed causes of little people.
>
> Freedom to distribute information to every citizen whatever he desires to receive it is so clearly vital to the preservation of a free society that, putting aside reasonable police and health regulations of time and manner of distribution, it must be fully preserved. The dangers of distribution can so easily be controlled by traditional legal methods, leaving to each householder the full right to decide whether he will receive strangers as visitors, that stringent prohibition can serve no purpose but that forbidden by the Constitution, the naked restriction of the dissemination of ideas.

Mr. Justice BLACK called attention to the provisions of American law which punish persons who enter the property of another after having been warned to keep off. He cited the cases which interpreted statutes of that character in at least twenty states, but declared that no state made a person a criminal trespasser if he enters the property of another for an innocent purpose without an explicit command from the owners to stay away. He called attention to the proposal of the National Institute of Municipal Law Officers for a form of regulations to its member cities, which would make it an offense for any person to ring the doorbell of a householder who had appropriately indicated that he is unwilling to be disturbed, and concludes his opinion as follows:

> The Struthers ordinance does not safeguard these constitutional rights. For this reason, and wholly aside from any other possible defects, on which we do not pass but which are suggested in other opinions filed in this case, we conclude that the ordinance is invalid because in conflict with the freedom of speech and press.
>
> The judgment below is reversed for further proceedings not inconsistent with this opinion.

Mr. Justice MURPHY filed a concurring opinion in which he emphasized the right given by the First and Fourteenth Amendments "freely to practice and proclaim one's religious convictions." He also declared his belief that "a man's home is his castle," and says:

> If this principle approaches a collision with religious freedom, there should be an accommodation, if at all possible, which gives appropriate recognition to both.

As to the character of the defendant's activity, he says:

> There can be no question but that appellant was engaged in a religious activity when she was going from house to house in the City of Struthers distributing circulars advertising a meeting of those of her belief. Distribution of such circulars on the streets cannot be prohibited. . . . Nor can their distribution on the streets or from house to house be conditioned upon obtaining a license which is subject to the uncontrolled discretion of municipal officials, . . . or upon payment of a license tax for the privilege of so doing.
>
> * * *
>
> No doubt there may be relevant considerations which justify considerable regulation of door to door canvassing even for religious purposes,—regulation as to time, number and identification of canvassers, etc., which will protect the privacy and safety of the home and yet preserve the substance of religious freedom. And, if a householder does not desire visits from religious canvassers, he can make his wishes known in a suitable fashion. The fact that some regulation may be permissible, however, does not mean that the First Amendment may be abrogated.
>
> * * *

Prohibition may be more convenient to the law maker, and easier to fashion than a regulatory measure which adequately protects the peace and privacy of the home without suppressing legitimate religious activities. But that does not justify a repressive enactment like the one now before us. . . . Freedom of religion has a higher dignity under the Constitution than municipal or personal convenience. In these days free men have no loftier responsibility than the preservation of that freedom. A nation dedicated to that ideal will not suffer but will prosper in its observance.

Mr. Justice DOUGLAS and Mr. Justice RUTLEDGE join in this opinion.

Mr. Justice FRANKFURTER filed a separate opinion in which he says:

From generation to generation fresh vindication is given to the prophetic wisdom of the framers of the Constitution in casting it in terms so broad that it has adaptable vitality for the drastic changes in our society which they knew to be inevitable, even though they could not foresee them. Thus it has come to be that the transforming consequences resulting from the pervasive industrialization of life find the Commerce Clause appropriate, for instance, for national regulation of an aircraft flight wholly within a single state. Such exertion of power by the national government over what might seem a purely local transaction would, as a matter of abstract law, have been as unimaginable to John Marshall as to Jefferson precisely because neither could have foreseen the present conquest of the air by man. But law, whether derived from acts of Congress or the Constitution, is not an abstraction. The Constitution cannot be applied in disregard of the external circumstances in which men live and move and have their being. Therefore neither the First nor the Fourteenth Amendment is to be treated by judges as though it were a mathematical abstraction, an absolute having no relation to the lives of men.

The habits and security of life in sparsely settled rural communities, or even in those few cities which a hundred and fifty years ago had a population of a few thousand, cannot be made the basis of judgment for determining the area of allowable self-protection by present-day industrial communities. The lack of privacy and the hazards to peace of mind and body caused by people living not in individual houses but crowded together in large human beehives, as they so widely do, are facts of modern living which cannot be ignored.

* * *

The Court's opinion apparently recognizes these factors as legitimate concerns for regulation by those whose business it is to legislate. But it finds, if I interpret correctly what is wanting in explicitness, that instead of aiming at the protection of householders from intrusion upon needed hours of rest or from those plying evil trades, whether pretending the sale of pots and pans or the distribution of leaflets, the ordinance before us merely penalizes the distribution of "literature." . . . The Court's opinion leaves one in doubt whether prohibition of all bell-ringing and door-knocking would be deemed an infringement of the constitutional protection of speech. It would be fantastic to suggest that a city has power, in the circumstances of modern urban life, to forbid house-to-house canvassing generally, but that the Constitution prohibits the inclusion in such prohibition of door-to-door vending of phylacteries or rosaries or of any printed matter. If the scope of the Court's opinion, apart from some of its general observations, is, as I read it to be, that this ordinance is an invidious discrimination against distributors of what is politely called literature, and that therefore the ordinance is from that aspect deemed an unjustifiable prohibition of freedom of utterance, the decision leaves untouched what are in my view controlling constitutional principles, if I am correct in my understanding of what is held, and I would not be disposed to disagree with such a construction of the ordinance.

Mr. Justice REED filed a dissenting opinion. Coming to the application of the ordinance and its interpretation by the Court, Mr. Justice REED says:

While I appreciate the necessity of watchfulness to avoid abridgments of our freedom of expression, it is impossible for me to discover in this trivial town police regulation a violation of the First Amendment. No ideas are being suppressed. No censorship is involved. The freedom to teach or preach by word or book is unabridged, save only the right to call a householder to the door of his house to receive the summoner's message. I cannot expand this regulation to a violation of the First Amendment.

Freedom to distribute publications is obviously a part of the general freedom guaranteed the expression of ideas by the First Amendment. It is trite to say that this freedom of expression is not unlimited. Obscenity, disloyalty and provocatives do not come within its protection. . . . All agree that there may be reasonable regulation of the freedom of expression. . . . One cannot throw dodgers "broadcast in the streets." . . .

The ordinance forbids "any person distributing handbills, circulars, or other advertisements to ring the doorbell, sound the door knocker, or otherwise summon the inmate or inmates . . . to the door" to receive the advertisement. The Court's opinion speaks of prohibitions against the distribution of "literature." The precise matter distributed appears in the footnote. I do not read the ordinance as prohibiting the distribution of literature nor can I appraise the dodger distributed as falling into that classification. If the ordinance, in my view, did prohibit the distribution of literature, while permitting all other canvassing, I should believe such an ordinance discriminatory. This ordinance is different. The most, it seems to me, that can be or has been read into the ordinance is a prohibition of free distribution of printed matter by summoning inmates to their doors. There are excellent reasons to support a determination of the city council that such distributors may not disturb householders while permitting salesmen and others to call them to the door. Practical experience may well convince the council that irritations arise frequently from this method of advertising. The classification is certainly not discriminatory.

If the citizens of Struthers desire to be protected from the annoyance of being called to their doors to receive printed matter, there is to my mind no constitutional provision which forbids their municipal council from modifying the rule that anyone may sound a call for the householder to attend his door. It is the council which is entrusted by the citizens with the power to declare and abate the myriad nuisances which develop in a community. Its determination should not be set aside by this Court unless clearly and patently unconstitutional.

* * *

The First Amendment does not compel a pedestrian to pause on the street to listen to the argument supporting another's views of religion or politics. Once the door is opened, the visitor may not insert a foot and insist on a hearing. He certainly may not enter the home. To knock or ring, however, comes close to such invasions. To prohibit such a call leaves open distribution of the notice on the street or at the home without signal to announce its deposit. Such assurance of privacy falls far short of an abridgment of freedom of the press. The ordinance seems

a fair adjustment of the privilege of distributors and the rights of householders.

Mr. Justice ROBERTS and Mr. Justice JACKSON join in this dissent.

The case was argued by Mr. Hayden C. Covington for the Jehovah's Witness and by Mr. Theodore T. Macejko for the City of Struthers.

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**Maritime Law, Words and Phrases "In the Service of the Ship"—Liability to Seaman for Injuries Suffered While Not on the Ship**

**A shipowner is liable for wages, maintenance and cure, to a seaman who, having left his vessel on authorized shore leave, is traversing the only available route between the moored ship and a public street.**

*Aguilar v. Standard Oil Co. of N. J.*, 87 L. ed. Adv. Ops. 799; 63 Sup. Ct. Rep. 930; U. S. Law Week 4311. (No. 454, decided April 19, 1943.) *Waterman Steamship Corp. v. Jones*, 87 L. ed. Adv. Ops. 799; 63 Sup. Ct. Rep. 930; U. S. Law Week 4311. (No. 582, decided April 19, 1943.)

Two separate actions are here decided in a single opinion. The question presented in each of these actions is whether a shipowner is liable to a seaman injured while leaving and returning to his vessel on authorized shore leave.

In neither of these cases was the injury due to the fault of the vessel owner or to the condition of premises under its control. In No. 582 the seaman fell into an open ditch alongside a railroad siding in consequence of the sudden extinguishment of the lights on the pier by which he was leaving his vessel. In No. 454 the seaman left his vessel, with permission of its owner, to attend to his own personal business, and while returning to his vessel was struck by an automobile.

In both cases the district court dismissed the action on the ground that at the time of the injury, the plaintiff was not ashore on the ship's business. In No. 582 the Circuit Court,Third Circuit, reversed. In No. 454 the Circuit Court, Second Circuit, affirmed. Certiorari was allowed because of the conflict that presented on an important question of maritime law.

The opinion of the Court was delivered by Mr. Justice RUTLEDGE. He states the question involved and the contentions of the respective parties as follows:

> The cases were brought here to resolve the conflict thus presented on an important question of maritime law.
>
> All admit the shipowner is liable if the injury occurs while the seaman is "in the service of the ship," and the issue is cast in these ambiguous terms, the parties giving different meanings to the ancient phrase.
>
> The claimants say it includes the whole period of service covered by the seaman's articles; and, if he is injured during this time, the right is made out, unless it is shown by way of defense he has forfeited it by misconduct causing the injury. Since the injuries here took place during the period and there was admittedly no misconduct, it is said the claims are established. Corollaries of this view are that recovery is not conditioned on showing the injury was received while the seaman was at work or doing some errand for the employer and that going ashore with leave or returning from it is part of being "in the service of the ship," whether or not it was to perform such an errand.
>
> The shipowners regard the phrase more narrowly. In their view it requires the seaman to be injured, if ashore, while he is "on duty" or at work, doing some task connected with the vessel's business. Going ashore simply for diversion and relief from its routine and discipline or for any matter personal to the seaman takes him out of the service of the ship; and the departure is made the moment he steps off deck and onto the dock or pier, perhaps as he descends the gangplank or ladder. . . . Likewise return is not made until he is on board again. . . . In this view it is of no moment whether the injury results from the seaman's fault or misconduct or from causes entirely beyond his control.
>
> It will aid in determining the scope of the liability to consider its origin and nature.

Mr. Justice RUTLEDGE then proceeds to discuss the origin of this fundamentally controlling doctrine, which makes the shipowner liable to the seaman for injuries while "in the service of the ship." He reviews judicial interpretation of that phrase and legislation pertinent to that liability and summarizes his conclusions as follows:

> When the seaman's duties carry him ashore, the shipowner's obligation is neither terminated nor narrowed. When he leaves the ship contrary to orders, however, the owner's duty is ended. Between these extremes are the instant cases, raising for the first time here the question of the existence and scope of the shipowner's duty when the seaman is injured while on shore leave but without specific chore for the ship.

Proceeding to the application of the controlling legal principle above discussed Mr. Justice RUTLEDGE declares that "the principles governing shipboard injuries apply to the facts presented by these cases" and after reviewing the facts and applying to them those principles, he says:

> There is strong ground therefore for regarding the right to maintenance and cure as covering injuries received without misconduct while on shore leave. Certainly the nature and foundations of the liability require that it be not narrowly confined or whittled down by restrictive and artificial distinctions defeating its broad and beneficial purposes. If leeway is to be given in either direction, all the considerations which brought the liability into being dictate it should be in the sailor's behalf. In this view, the nature and purposes of the liability do not permit distinctions which allow recovery when the seaman becomes ill or is injured while idle aboard, . . .

The judgment in No. 582 is affirmed; that in No. 454 is reversed and remanded to the district court for further proceedings not inconsistent with this opinion.

Mr. Justice ROBERTS did not participate in the consideration or decision of this case.

The CHIEF JUSTICE thinks that the judgment in No. 454 should be affirmed for the reasons stated in the opinion of the Circuit Court of Appeals below. In No. 582 he concurs in the result on the ground that the recovery was authorized by the Shipowner's Liability Convention, 54 Stat. 1695, which became effective before the date of respondent's injury. He is of opinion that Article 2, Clause 1 of the treaty authorizing the recovery is self-executing, and that the exceptions per-

mitted by Clause 2 are not operative in the absence of Congressional legislation giving them effect.

No. 582 was argued by Mr. Joseph W. Henderson for the Steamship Corporation and by Mr. Abraham E. Freedman for seaman Jones; and No. 454 by Mr. George J. Engelman for seaman Aguilar and by Mr. Walter X. Connor for the Standard Oil Company.

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### Interstate Commerce Act—Unjust Discrimination and Undue Prejudice in Rates

**It is within the competence of the Interstate Commerce Commission to permit carriers by rail to include in their tariffs a loading charge covering less-than-carload shipments of cotton moving to certain points and to eliminate that charge on shipments moving to other points, in order to enable the carriers to meet truck competition to the latter points.**

*L. T. Barringer and Company v. The United States of America et al.*, 87 L. ed. Adv. Ops. 892; 63 Sup. Ct. Rep. 967; U. S. Law Week 4354. (No. 520, decided May 3, 1943.)

The question here was whether the Interstate Commerce Commission erred in refusing to set aside tariffs on cotton, filed by five railroads, as unjustly discriminatory and unduly prejudicial to shippers in violations of §§ 2 and 3 (1) of the Interstate Commerce Act.

In order to aid the carriers in meeting truck competition on rail movements of cotton from certain points in Oklahoma to certain ports on the Gulf of Mexico the tariffs relieved the shippers of loading charges. But on cotton moving from the same Oklahoma points to the Southeast, the shippers were required to pay the loading charges. The shippers here contest the action of the Commission refusing to suspend the proposed tariffs retaining the loading charges, and contend that the situation would create unjust discrimination under § 2 and would be unduly prejudicial under § 3 (1).

The shipper's principal contention is that in considering the validity of the proposed tariffs under § 2 the Commission could look only at the charge for the loading service and was not entitled to consider conditions relating to the other line-haul rates, the latter consideration being the chief factor which the Commission considered justified the difference in charges in order to enable the rail carriers to meet truck competition in the movement of cotton to the Texas ports. Section 2 declares it to be "an 'unjust' and prohibited discrimination for any carrier 'directly or indirectly, by any special rate, rebate . . . drawback or other device,' to charge one person more or less than another for 'a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions.'"

On appeal to the Supreme Court the ruling of the district court of three judges was affirmed. The district court had sustained the order of the Commission. Mr. Chief Justice STONE delivered the opinion of the Supreme Court.

After observing that it has been long settled that differences in competitive conditions may justify a relatively lower line-haul rate over one line than another, the opinion states that competitive conditions may also justify and render non-discriminatory a reduction if made in the loading charge instead. From this point the CHIEF JUSTICE continues:

> Whether made in the one charge or the other, it enters into the total cost of the line haul to the shipper, regardless of whether the loading charge be separately stated or included in the line-haul tariff. Since the only effect on the shipper is in the difference in the line-haul charge and he is harmed no more by one method of effecting that difference than the other, any conditions attending the line haul which justify the one as non-discriminatory equally justify the other.
>
> This Court has held the Commission may consider the through line-haul rate in determining whether a related accessorial charge is just and reasonable under § 1 (5) (a). . . . We find nothing in § 2 or in our decisions that precludes the Commission from similarly looking at the whole of the services rendered to different shippers to determine whether the conditions are such as to justify a difference in charges made for one component part of that whole. Nor has the Commission found such a limitation in the statute. . . .
>
> Obviously there is nothing in this construction of § 2 which would preclude the Commission from setting aside a difference in a separately stated service charge which in fact operates to discriminate unjustly among shippers. We have repeatedly sustained a finding of the Commission that such a difference, based on a difference in identity of shippers or the ownership of the goods shipped, or on other circumstances irrelevant to the carrier service rendered, is an unjust discrimination to shippers. . . . The distinction between those cases and this is that here the difference in the service charge is made between through shippers over different routes, and is based on relevant differences in the "circumstances and conditions" of the total transportation services rendered by the carriers. It was within the competence of the Commission to find that this involved no unjust discrimination.
>
> This is not to say that in every case where the differences in total transportation services rendered are such as would justify a greater charge to one than to another shipper, the difference in charge can at the carrier's option be made in the charge for an accessorial service such as the loading service here involved. But the decision whether the circumstances and conditions are such as to justify a difference in the accessorial charge, or rather to require that any adjustment be made in the line-haul charge, is one which the statute has left to the determination of the Commission, which Congress has entrusted with the power and duty of guarding against the prohibited favoritism. In the circumstances of this case we cannot set aside, as lacking in rational basis, the Commission's determination that the reduction in the line-haul cost to the shipper effected by remission of the loading charge did not result in an unjust discrimination.

The Court also considered and rejected objections based upon § 3 (1).

Mr. Justice DOUGLAS delivered a dissenting opinion in which Mr. Justice ROBERTS, Mr. Justice BLACK and Mr. Justice REED joined.

Stating that the Commission's view is based upon *Wight* v. *United States*, 167 U. S. 512, Mr. Justice DOUGLAS expresses his disagreement with that construction of § 2. Referring to the Commission's posi-

tion, and in exposition of his disagreement with that position, Mr. Justice DOUGLAS says:

> Its argument is that § 2 does not apply where the line-hauls are not over the same line, for the same distance, and to the same destination. That contention is based on *Wight* v. *United States*, 167 U. S. 512, which the Commission claims to have followed consistently.
>
> I disagree with that construction of § 2. The *Wight* case involved a rebate by one road of a part of the rate between Cincinnati and Pittsburgh and was made on account of drayage at the Pittsburgh end. The Court held that § 2 was violated, saying that that section "prohibits any rebate or other device by which two shippers, shipping over the same line, the same distance, under the same circumstances of carriage, are compelled to pay different prices therefor." . . . It does not follow that § 2 applies ONLY where those identical conditions exist. Thus in *Birkett Mills* v. *Delaware, L. & W. R. Co.*, 123 I. C. C. 63, the Commission had before it a complaint of millers, grain dealers, and elevator companies in New York respecting different transit charges on ex-lake and all-rail traffic, the transit charges being separately established. It held that "as the differing transit charges are for the same transit services at the same points by the same carriers, unjust discrimination under section 2 of the act exists." . . . No reference was made to line-haul conditions, though the relation between transit privileges and rate structures is intimate. . . . And the principles of the *Birkett Mills* case have been applied by the Commission to other situations where the haul was not over the same line, for the same distance, and to the same destination.

The case was argued by Mr. Nuel D. Belnap for Barringer, by Mr. Robert L. Pierce for the United States, and by Mr. Roland J. Lehman for the Railroad Company.

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### Income Taxes—Depreciation Allowances—Payments by Customers of Utility Company Not Part of Cost

**Under the Revenue Act of 1936 payments made by customers of a utility company to defray cost of facilities owned by the utility are not part of the cost of property upon which the utility's depreciation allowances are to be computed.**

*The Detroit Edison Company* v. *Commissioner of Internal Revenue*, 87 L. ed. Adv. Ops. 917; 63 Sup. Ct. Rep. 902; U. S. Law Week 4323. (No. 675, decided May 3, 1943.)

The question for decision here was whether certain payments made by customers of the utility company to defray construction costs of facilities, title to which vests in the utility, are to be included in the latter's depreciable property as part of the cost thereof. Citing the provisions of §§ 23 (l), 23 (n), 113, and 114, the Supreme Court, in an opinion by Mr. Justice JACKSON holds that the payments so made by customers are not part of the cost on which depreciation is to be computed. The opinion states:

> It will be seen that the rule applicable to most business property of a cost basis properly adjusted leaves many problems of depreciation accounting to be answered by sound and fair tax administration. The end and purpose of it all is to approximate and reflect the financial consequences to the taxpayer of the subtle effects of time and use on the value of his capital assets. For this purpose it is sound accounting practice annually to accrue as to each classification of depreciable property an amount which at the time it is retired will with its salvage value replace the original investment therein. Or as a layman might put it, the machine in its life time must pay for itself before it can be said to pay anything to its owner. Experience and judgment hit upon usable mortality tables for classes of property from which annual rates of accrual are estimated and several different methods are employed for relating this physical deterioration and functional obsolescence to financial statements. The calculation is influenced by too many variables to be standardized for differing enterprises, assets, conditions, or methods of business. The Congress wisely refrained from formalizing its methods and we prescribe no over-all rules.
>
> But we think the statutory provision that the "basis of property shall be the cost of such property" [§ 113 (a)] normally means, and that in this case the Commissioner was justified in applying it to mean, cost to the taxpayer. A property may have a cost history quite different from its cost to the taxpayer. It may have been purchased for less or more than original cost, or built by contract which called for payments on which the builder profited greatly or suffered heavy loss. But generally and in this case the Commissioner was in no error in ruling that the taxpayer's outlay is the measure of his recoupment through depreciation accruals.

The CHIEF JUSTICE did not participate.

The case was argued by Mr. Norris Darrell for Detroit Edison Company, and by Mr. Arnold Raum for the Commissioner.

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### Federal Power Act—Scope of Regulatory Power of Federal Power Commission

**The Federal Power Act extends to a public utility which generates and sells electric power and transmits it over its own facilities, within the same state, to another local company, which in turn, transmits the power for sale and consumption in another state.**

**Even though the utility in question is subject to state regulation in certain respects, § 201(a) of the Federal Act does not exempt the utility from all federal regulation, but leaves the regulatory power over financial affairs vested in the Federal Commission.**

*Jersey Central Power & Light Co.* v. *Federal Power Commission*, 87 L. ed. Adv. Ops. 869; 63 Sup. Ct. Rep. 953; U. S. Law Week 4338. (Nos. 299 and 329, decided May 3, 1943.)

In this opinion, by Mr. Justice REED, the Court construes §§ 201 and 203(a) of the Federal Power Act as amended by the Public Utility Act of 1935.

New Jersey Power & Light Company purchased from others than the issuer certain securities of Jersey Central Power & Light Company. The Federal Power Commission, deeming the purchaser and issuer both public utilities under the Power Act instituted proceedings challenging the legality of the stock acquisition, because not approved by that Commission. Jersey Central intervened and two questions were presented: (1) whether Jersey Central was a public utility under the Act; and (2) whether, if it was, the acquisition was permissible in view of § 201 (a) declaring that federal regulation should "extend only to those matters which are not subject to regulation by the states." This purchase is subject to regulation by New Jersey.

It was admitted that Jersey Power, the purchaser, is a public utility under the Act. The Commission

after hearing held that Jersey Central was also subject to the Act.

That holding was based on facts showing that Jersey Central owns and operates generating and transmission facilities in New Jersey which connect with Public Service Company, another New Jersey company. Jersey Central's transmission line is seven-eighths of a mile long. Public Service transmits the energy from a point on the Raritan River to a common bus bar at Perth Amboy. From this bus bar Public Service has transmission facilities extending to a connection with Staten Island Edison Company which distributes energy in Staten Island, New York. The Commission found that energy generated in New Jersey by Jersey Central was consumed in New York and energy generated in New York was consumed in New Jersey.

It appeared further that Jersey Central has no control over the destination of its energy after its delivery to Public Service and that the deliveries from Public Service to Staten Island and derived from Jersey Central were small in amount. The connection between Public Service and Staten Island is maintained chiefly to guard against breakdown. On this and other evidence stated in the opinion in more detail, the Supreme Court, by divided bench, affirmed the ruling of the Circuit Court of Appeals which had upheld the Commission's conclusion that the Jersey Central's facilities are used in transmitting electric energy across state lines.

The discussion of the questions of law opens with the observation that the primary purpose of the Act was to give a federal agency power to regulate the sale of electric energy across state lines, a power denied to the states in *Public Utilities Commission* v. *Attleboro Steam & Electric Co.*, 273 U. S. 83. Then follows a discussion of the meaning of § 201 (a) and (b) in the light of arguments advanced by the utility companies. The conclusion of the Court as to the status of Jersey Central under § 201 is stated as follows in the opinion:

> The language of section 201 (a) and (b) indicates a distinction between the facilities for generation or production and those for transmission. Also, it is sales at wholesale only which are regulated and, finally, Commission power does not extend over all connecting transmitting facilities but only over those which transmit energy actually moving in interstate commerce. Mere connection determines nothing.
>
> Further, we think the definition in subsection (e) of "public utility" covers Jersey Central, since that company owns and operates the transmission line to the Raritan and that line, as a result of the interpretation of interstate commerce in the preceding paragraph, is a facility under Commission jurisdiction by the terms of subsection (b). Subsection (b) declares that the provisions of this part apply "to the transmission of electric energy at wholesale in interstate commerce." This subsection gives jurisdiction over facilities used for such transmission. The business of transmitting and selling electric energy is said to be affected with a public interest and federal regulation of a portion of that business is declared necessary. Section 201 (a). The fact that a company is engaged in this business is not determinative of its inclusion in this act. The determinative fact is the ownership of facilities used in transmission. Such use makes the owner or operator of such facilities a public utility under the act (e). We conclude, therefore, that Jersey Central is a public utility under this act. It is quite clear, however, from section 201 that although a company may be a public utility under subsection (e), all of its transactions do not thereby fall under the regulatory power of the Commission.

The opinion then considers the effect of the limitation expressed in § 201 (a) that "Federal regulation, however, [is] to extend only to those matters which are not subject to regulation by the state," in its relation to the issue of securities and assumption of obligations by a public utility whose facilities are subject to regulation by the Power Commission. On this question the Court concludes that the limitation quoted does not extend to corporate financial arrangements. Mr. Justice REED says:

> The Commission denies that this limitation is to be read into section 203 (a). If the limitation is to be read as applying to section 203 (a), the limitation exempts this transaction and the purchase here involved is beyond the reach of Commission power for the reason that the purchase could be and the transfer is regulated by the State of New Jersey.
>
> It will be observed that section 201 (a) is a declaration of the end sought by the enactment of this Part, that is, federal regulation of the generation, transmission and sale of electric energy in commerce. The sounder conclusion, it seems to us, is that this limitation is directed at generation, transmission and sale rather than the corporate financial arrangements of the utilities engaged in such production and distribution. This conclusion finds strong support in the fact that not only section 203 (a), here under discussion, but sections 204 (a), 208 and 301 (a) regulate matters obviously subject to state regulation. If the scope of the limitation was as broad as petitioners contend, none of these sections just referred to would be effective. Section 203 (a) would be a nullity as of course the disposition and acquisition of facilities, merger, consolidation or purchase of securities by their utilities may be regulated by the states. But this does not follow where a specific limitation is placed on the issue of securities by section 204. Section 204 is not rendered useless by subsection (f) since it is applicable to states without state commissions authorized to regulate security issues. . . . In view of the contemporaneous legislation as to holding companies (Title I, Public Utility Act of 1935, 49 Stat. 803) which left independent operating companies or subsidiaries of unregistered holding companies free to acquire securities in other operating companies, it is difficult to conclude that by section 201 (a) Congress limited the regulation of the acquisition of securities by section 203 (a).
>
> The legislative history points to this result. . . .

Mr. Justice ROBERTS delivered a dissenting opinion. His approach to the problems presented is indicated in the following excerpt from his opinion:

> The construction now given to the Act makes the Commission's power to regulate Jersey Central depend, not on the nature of its own business, as § 201 (a) and (b) plainly require, but on the interstate character of the business of Public Service, over which Jersey Central has no control and which is subject to regulation by the Commission. § 201 (b) and (e). I can find no support in the language, history or avowed purposes of the Act for such

a construction. Moreover, it is in flat contradiction to the words of § 201 (a), (b), and (e), which, when read together, explicitly exclude from the jurisdiction of the Commission a "person" who "owns or operates facilities" otherwise subject to the jurisdiction of the Commission by providing, in § 201 (a), that the federal regulation is "to extend only to those matters which are not subject to regulation by the states." Jersey Central is engaged in generating electricity which it sells and delivers to Public Service, all within the state. When the present Act was adopted it was not doubted, and in the light of our decisions it could not be, that the seller's business was intrastate and subject to state regulation. The manufacture and sale of a product wholly within a state is not interstate commerce even though the product is destined by the buyer to be shipped out of the state in interstate commerce. That this is equally the case where the product produced and sold within the state is gas or electricity is implicit in our decisions. As will presently appear more in detail, while it was the purpose of Congress, in enacting the Federal Power Act to extend the national control over the interstate transmission and sale of electrical energy, which had been held to be beyond the control of the states, the purpose was equally to preserve unimpaired the existing state power of regulation over intrastate production and sale. The provisions of § 201 to which I have referred were introduced into the legislation which became the Federal Power Act in the course of its progress through Congress with the repeatedly declared object of accomplishing that precise purpose.

I submit that to argue that, as Jersey Central's seven-eighths' mile intrastate line which connects with the lines of its intrastate customer, Public Service, is a facility over which flows energy which sometimes ultimately finds its way from Public Service's system into New York, and, hence, a facility for transmission of electric energy interstate, ownership of which subjects the owner to the Commission's jurisdiction, is to tie together two phrases found in separate provisions of the Act and to ignore the statute's provisions viewed in their integrity and entirety. By this process any desired result may readily be reached.

I conclude that the provisions of § 203 relating to regulation of security issues should not be considered since § 201 wholly excludes Jersey Central from the scheme of control established by the Act. . . .

The CHIEF JUSTICE and Mr. Justice FRANKFURTER concurred with Mr. Justice ROBERTS.

The case was argued by Mr. Frederic P. Glick and Mr. Allen P. Throop for New Jersey Power & Light Co. and by Mr. John W. McDonald for Jersey Central Power & Light Co., and by Mr. Assistant Attorney General Shea and Mr. Lester P. Schoene for the Federal Power Commission.

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### Taxation—Transfer of Property in Contemplation of Death

**The state of domicile of the creator of a trust transferring intangible property may constitutionally tax the transfer as one in contemplation of death, although the evidences of the property were kept outside the state, the trust executed outside, and the grantees were non-residents at the time contingent remainders to them became vested. The value in computing the tax may be the value at the time of death rather than the value at the time the trust was executed.**

*Central Hanover Bank and Trust Co. v. Kelly*, 87 L. ed. Adv. Ops. 914; 63 Sup. Ct. Rep. 945; U. S. Law Week 4325. (No. 659, decided May 3, 1943.)

A resident of New Jersey owned securities which he kept in New York. He went to the latter state in 1929 and executed an irrevocable deed of trust to the securities to the appellant trust company providing for payment of the income to the grantor for life, to his wife thereafter, or if she predeceased him one-half of the principal was to go to each of his two sons. The wife died first, and on the grantor's death both sons survived.

The New Jersey courts construed a tax law of that state as imposing a tax on the transfer, as in contemplation of death, and as construed, sustained the tax over the trustee's contention that the tax as applied violated the due process and equal protection clauses of the Fourteenth Amendment. On appeal the judgment was affirmed in an opinion by Mr. Justice DOUGLAS. The opinion first observes that it is much too late to contend that domicile alone is not sufficient to give the domiciliary state the constitutional power to tax a transfer of intangibles, where the owner, though domiciled in the state, keeps the paper evidences of the intangibles outside of its boundaries.

Then is discussed the contention that there was no taxable transfer to the sons in 1929 and that New Jersey had not measured the tax on its value in 1929 but on its value at the time of the grantor's death. It was argued also that if the interest passed to the sons at the latter date, New Jersey was without power to tax the transfer.

Rejecting these contentions, Mr. Justice DOUGLAS says:

> The determination by the New Jersey courts of the kind of interest transferred and the time when it was effected is a matter of local law binding on us. . . . There is no constitutional reason why a state may not make the transfer *inter vivos* the taxable event and then measure the tax by the value of the property at time of death. . . . A state which may tax the disposition of property made by one of its domiciliaries certainly may make the payment of the tax conditional on his being domiciled in the state at his death, and may delay payment until then. The fact that the taxable event and the tax levy are widely separated in time is quite irrelevant. In short, "The due process clause places no restriction on a state as to the time at which an inheritance tax shall be levied or the property valued for purposes of such tax." . . . And if the transfer to the sons is assumed to have taken place only at the time of the grantor's death, there is no constitutional reason why the result need be different. The fact that he did not then "own" the property is inconsequential. . . . The significant facts are that the rights of the remaindermen derived solely from the trust agreement and that the grantor died domiciled in New Jersey.

The case was argued by Mr. Robert McC. Marsh for the banking corporation and by Mr. William A. Moore for the State of New Jersey.

## Federal Communications Act of 1934—Scope of Powers Granted Federal Communications Commission

**The Federal Communications Act of 1934 is construed to empower the Federal Communications Commission to regulate the practices of broadcasting companies engaged in the business of chain broadcasting, and regulations promulgated by the Commission with respect to the issuance of licenses to broadcast stations are sustained as within the powers of the Commission. The Regulations are sustained also as consistent with the First Amendment.**

*National Broadcasting Co. et al. v. U. S. et al.*, 87 L. ed. Adv. Ops. 933; 63 Sup. Ct. Rep. 997; U. S. Law Week 4365. (Nos. 554-555, decided May 10, 1943.)

This opinion deals with two suits brought by National Broadcasting Company and Columbia Broadcasting System respectively to enjoin enforcement of Chain Broadcasting Regulations promulgated by the Federal Communications Commission. The district court sustained the government's motions for summary judgment, and dismissed the suits on the merits. On direct appeal the Supreme Court affirmed, in an opinion by Mr. Justice FRANKFURTER.

The opinion first summarizes the history of the proceedings before the Commission out of which the Regulations grew, and the findings of the Commission are also outlined. That tribunal had found that various specific practices in the industry were detrimental to the public interest, and that the various practices taken together called more urgently for the regulations than they did separately considered.

Eight abuses were found amenable to correction within the regulatory powers conferred on the Commission by Congress. These abuses were met by regulations forbidding exclusive affiliations of stations, and territorial exclusivity, limiting the term of station affiliation to two years, regulating option time clauses, regulating clauses affecting the licensee's right to reject programs, governing ownership and control of stations to prevent restraint of competition, and preventing networks from interfering with the rights of stations to fix or alter their rates for broadcasting time.

The opinion then states the various grounds on which the Regulations were attacked as being beyond the powers granted to the Commission. An extended analysis of the statute is then presented in relation to the contentions advanced by the broadcasting companies. The conclusion of the Court upon these aspects of the case is expressed as follows by Mr. Justice FRANKFURTER:

> We conclude, therefore, that the Communications Act of 1934 authorized the Commission to promulgate regulations designed to correct the abuses disclosed by its investigation of chain broadcasting. There remains for consideration the claim that the Commission's exercise of such authority was unlawful.

The Regulations were also assailed as "arbitrary and capricious." Rejecting this contention the opinion states:

> It would be sheer dogmatism to say that the Commission made out no case for its allowable discretion in formulating these Regulations. Its long investigation disclosed the existences of practices which it regarded as contrary to the "public interest." The Commission knew that the wisdom of any action it took would have to be tested by experience: "We are under no illusion that the regulations we are adopting will solve all questions of public interest with respect to the network system of program distribution. . . . The problems in the network field are interdependent, and the steps now taken may perhaps operate as a partial solution of problems not directly dealt with at this time. Such problems may be examined again at some future time after the regulations here adopted have been given a fair trial." (Report, p. 88.) The problems with which the Commission attempted to deal could not be solved at once and for all time by rigid rules-of-thumb. The Commission therefore did not bind itself inflexibly to the licensing policies expressed in the Regulations. In each case that comes before it the Commission must still exercise an ultimate judgment whether the grant of a license would serve the "public interest, convenience, or necessity." If time and changing circumstances reveal that the "public interest" is not served by application of the Regulations, it must be assumed that the Commission will act in accordance with its statutory obligations.
>
> Since there is no basis for any claim that the Commission did not fail to observe procedural safeguards required by law, we reach the contention that the Regulations should be denied enforcement on constitutional grounds. Here as in *N. Y. Central Securities Co.* v. *United States*, 287 U. S. 12, 24-25, the claim is made that the standard of "public interest" governing the exercise of the powers delegated to the Commission by Congress is so vague and indefinite that, if it be construed as comprehensively as the words alone permit, the delegation of legislative authority is unconstitutional. But, as we held in that case, "It is a mistaken assumption that this is a mere general reference to public welfare without any standard to guide determinations. The purpose of the Act, the requirements it imposes, and the context of the provision in question show the contrary."

Finally, the Court discusses the argument that the Regulations abridge the broadcasting companies' freedom of speech and hence violate the First Amendment. The basis for this argument and the reasons for its rejection are indicated in the following part of the opinion:

> We come, finally, to an appeal to the First Amendment. The Regulations, even if valid in all other respects, must fall because they abridge, say the appellants, their right of free speech. If that be so, it would follow that every person whose application for a license to operate a station is denied by the Commission is thereby denied his constitutional right of free speech. Freedom of utterance is abridged to many who wish to use the limited facilities of radio. Unlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to governmental regulation. Because it cannot be used by all, some who wish to use it must be denied. But Congress did not authorize the Commission to choose among applicants upon the basis of their political, economic, or social views, or upon any other capricious basis. If it did, or if the Commission by these Regulations proposed a choice among applicants upon some such basis, the issue before us would be wholly different. The question here is simply whether the Commission, by announcing that it will refuse licenses to persons who engage in specified

network practices (a basis for choice which we hold is comprehended within the statutory criterion of "public interest"), is thereby denying such persons the constitutional right of free speech. The right of free speech does not include, however, the right to use the facilities of radio without a license. The licensing system established by Congress in the Communications Act of 1934 was a proper exercise of its power over commerce. The standard it provided for the licensing of stations was the "public interest, convenience, or necessity." Denial of a station license on that ground, if valid under the Act, is not a denial of free speech.

Mr. Justice MURPHY delivered a dissenting opinion in which he takes the position that the Regulations are beyond the statutory powers granted to the Commission. This view is indicated in the opening paragraphs of the dissent in which Mr. Justice MURPHY says:

> I do not question the objectives of the proposed regulations, and it is not my desire by narrow statutory interpretation to weaken the authority of government agencies to deal efficiently with matters committed to their jurisdiction by the Congress. Statutes of this kind should be construed so that the agency concerned may be able to cope effectively with problems which the Congress intended to correct, or may otherwise perform the functions given to it. But we exceed our competence when we gratuitously bestow upon an agency power which the Congress has not granted. Since that is what the Court in substance does today, I dissent.
>
> In the present case we are dealing with a subject of extreme importance in the life of the nation. Although radio broadcasting, like the press, is generally conducted on a commercial basis, it is not an ordinary business activity, like the selling of securities or the marketing of electrical power. In the dissemination of information and opinion radio has assumed a position of commanding importance, rivalling the press and the pulpit. Owing to its physical characteristics radio, unlike the other methods of conveying information, must be regulated and rationed by the government. Otherwise there would be chaos, and radio's usefulness would be largely destroyed. But because of its vast potentialities as a medium of communication, discussion and propaganda, the character and extent of control that should be exercised over it by the government is a matter of deep and vital concern. Events in Europe show that radio may readily be a weapon of authority and misrepresentation, instead of a means of entertainment and enlightenment. It may even be an instrument of oppression. In pointing out these possibilities I do not mean to intimate in the slightest that they are imminent or probable in this country, but they do suggest that the construction of the instant statute should be approached with more than ordinary restraint and caution, to avoid an interpretation that is not clearly justified by the conditions that brought about its enactment, or that would give the Commission greater powers than the Congress intended to confer.
>
> The Communications Act of 1934 does not in terms give the Commission power to regulate the contractual relations between the stations and the networks. . . . It is only as an incident of the power to grant or withhold licenses to individual stations under §§ 307, 308, 309 and 310 that this authority is claimed, except as it may have been provided by subdivisions (g), (i) and (r) of § 303, and by §§ 311 and 313. But nowhere in these sections, taken singly or collectively, is there to be found by reasonable construction or necessary inference, authority to regulate the broadcasting industry as such, or to control the complex operations of the national networks.

Mr. Justice ROBERTS concurred in the dissent.

Mr. Justice BLACK and Mr. Justice RUTLEDGE did not participate.

Case No. 554 was argued by Mr. John T. Cahill for NBC, and by Mr. E. Willoughby Middleton for Stromberg-Carlson Telephone Manufacturing Company and by Mr. Solicitor General Fahy for the United States and FCC; No. 555 was argued by Mr. Charles E. Hughes, Jr., for CBS and by Mr. Solicitor General Fahy for the United States and FCC and by Mr. Louis G. Caldwell for Mutual Broadcasting System, Inc. in both cases.

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# SUMMARIES

**Selective Service—Failure to Report for Induction—Conscientious Objector—Procedure**

*Bowles v. U. S.*, 87 L. ed. Adv. Ops. 919; 63 Sup. Ct. Rep. 912; U. S. Law Week 4361. (No. 589, decided May 3, 1943.)

Bowles claimed to be a "conscientious objector." The local draft board denied his claim, and the appeal board (contrary to the advisory opinion of the Department of Justice) confirmed his classification in 1A. Both boards, according to Bowles' contention, based their decision on the ground that he was not a member of any well-recognized religious sect whose creed forbade its members to participate in war in any form. Bowles failed to appear for induction, and was prosecuted under the Selective Service Act. On the trial in the district court he attempted to prove what he claimed to be the erroneous basis of his classification by the two boards, but he was refused leave to inspect his Selective Service file. He was convicted. On appeal, the Circuit Court of Appeals for the Third Circuit held (1) that the district court was wrong in denying Bowles' right of access to the file, as provided by law, and (2) that the court was also wrong in its interpretation of the present draft act, which (unlike the 1917 law) grants exemption to a person "who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form," whether or not he is a member of a religious sect with such a creed. The circuit court of appeals, however, held that Bowles had taken the wrong course: he should have submitted to induction, and then applied for a writ of habeas corpus, by which procedure the legality of the order of the local board could have been reviewed. Accordingly his conviction was affirmed.

On writ of certiorari, the Supreme Court affirmed this judgment. During the argument in the Supreme Court, the government showed from Bowles' Selective Service file that he had appealed to the President from the decision of the board of appeals; that the Director of

Selective Service, by authority of the President, had considered the appeal and affirmed the denial of classification for Bowles as a "conscientious objector"; and that this decision had been communicated to Bowles by the local draft board. All this was before the order to report for induction. The Supreme Court, in a *per curiam* opinion, said:

> . . . The claim to exemption was rejected by the Director on the ground that in fact petitioner was not conscientiously opposed to military service, and that he was therefore not entitled to the benefit of the exemption prescribed by the Act. Before the local draft board issued its order to petitioner, the appeal board's determination, which he assails here, had been superseded by the action taken by the Director on the final appeal to the President. Hence the order rests on the Director's controlling determination of fact, adverse to petitioner's claim of conscientious objection to military service, and not on the alleged erroneous interpretation of the Act which petitioner urges as a defense in the present criminal proceeding.

The judgment of conviction was thereupon affirmed.

Mr. Justice JACKSON (joined by Mr. Justice REED) dissented, saying:

> . . . Where the prosecution has illegally closed to the defendant files to which he was entitled, I do not think we should allow it to supplement the record here for the purpose of precluding decision of questions which, even if doubtful, Bowles seems entitled to raise if he can establish that the order of induction was illegal.

The case was argued by Mr. Osmond K. Fraenkel for Bowles and by Mr. Assistant Attorney General Berge for the United States.

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**Fair Labor Standards Act—Exemption of Certain Employees Subject to Regulation by Interstate Commerce Commission**

*Southland Gasoline Company v. J. W. Bayley, Henry V. Bloom, G. C. Kendall et al.*, 87 L. ed. Adv. Ops. 903; 63 Sup. Ct. Rep. 917; U. S. Law Week 4337. (Nos. 581 and 725, decided May 3, 1943.)

These two cases were reviewed on certiorari to resolve a conflict of decisions as to the interpretation of § 13 (b) (1) of the Fair Labor Standards Act of 1938.

Section 7 of that Act relates to the maximum number of hours per week an employer may employ an employee engaged in interstate commerce or in production of goods for commerce. Exemption from the standards as granted by § 13 (b) (1) depends on the meaning of § 204 (a) of the Motor Carrier Act, which imposes on the Interstate Commerce Commission the duty to establish, among other things, the "qualifications and maximum hours of service of employees, and safety of operation and equipment" for common carriers by motor vehicle. Like duties are imposed on the Commission with respect to contract carriers and private carriers.

Section 13 (b) states that the provisions of § 7 shall not apply with respect to (1) any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of § 204 of the Motor Carrier Act, 1935; or (2) any employee of an employer subject to the provisions of Part I of the Interstate Commerce Act.

Both employers here are private carriers in interstate commerce and all their employees subject to regulation under § 204 (a) (3). In both cases the employees claimed time and one-half for overtime as required by § 7 up to but not beyond May 1, 1940, at which time the Commission first found need to establish the requirements referred to in § 204 (a) (3).

The Eighth Circuit found that the exemption operated only after the Commission's action of May 1, 1940, but the Fourth Circuit held *contra*, adopting the view that "power" in § 13 (b) meant the existence of the power rather than its actual exercise. On certiorari the view of the Fourth Circuit was sustained by the Supreme Court in an opinion by Mr. Justice REED, in No. 725, and the decision of the Eighth Circuit reversed in No. 581.

Mr. Justice MURPHY did not participate.

No. 581 was submitted by Mr. Claude H. Rosenstein and Mr. C. D. Atkinson; and No. 725 was argued by Mr. George A. Mahone for Richardson and by Mr. O. Bowie Duckett, Jr., and Mr. Charles T. LeViness for James Gibbons Co.

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**National Labor Relations Act—Findings of Board as to Employer's Domination of Employees' Bargaining Agency Sustained**

*National Labor Relations Board v. Southern Bell Telephone and Telegraph Co.*, 87 L. ed. Adv. Ops. 884; 63 Sup. Ct. Rep. 905; U. S. Law Week 4335. (Nos. 460, 461, decided May 3, 1943.)

The question here presented was whether an order of the Board was supported by substantial evidence.

The Board's order directed the employer to desist from dominating or interfering with the employees' association and from contributing financial or other support to it, recognizing it as the collective bargaining agent of employees and from giving effect to or making any collective bargaining agreement with the association. The Circuit Court of Appeals vacated the order of the Board and denied its petition for enforcement.

On certiorari and after a review of the evidence, the Supreme Court, in an opinion by Mr. Justice REED, concludes that the Board's order was supported by substantial evidence, and the ruling of the Circuit Court of Appeals was reversed with directions to enforce the Board's order.

It appeared that the association had been a company union before the National Labor Relations Act went into effect and that various changes in its relation to the employer had been effected to meet the requirements of the statute. Whether the association had become entirely free from employer control the Court found was a question for the Board and the latter's

decision is sustained with the comment that "Its conclusion is an inference of fact which may not be set aside upon judicial review because the courts would have drawn a different inference."

Mr. Justice ROBERTS did not participate.

The case was argued by Mr. Robert B. Watts for NLRB, by Mr. Marion Smith for the Telephone Company, and by Mr. James A. Branch for the Telephone Company employees.

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**Practice on Appeal—Mandamus Cannot Be Substituted For Appeal**

*Roche et al. v. Evaporated Milk Ass'n et al.*, 87 L. ed. Adv. Ops. 907; 63 Sup. Ct. Rep. 938; U. S. Law Week 4359. (No. 584, decided May 3, 1943.)

The question for decision was whether the Circuit Court of Appeals rightly issued a writ of mandamus to the district court to correct the latter's alleged error in striking pleas in abatement to a criminal indictment.

The indictment was returned in June, 1941, by a grand jury sitting in the district court for Southern California charging defendant and others with conspiracy to fix the price of evaporated milk in violation of the Sherman Act. The grand jury had been impaneled at the November, 1940, term, and the indictment recited that that jury had begun but had not finished an investigation of the matters charged in the indictment during the November, 1940, term, and that the grand jury had continued to sit during the March, 1941, term to finish an investigation begun but not completed in the prior November term.

The pleas in abatement asked that the indictment be quashed for want of jurisdiction on the ground that the minutes of the grand jury disclosed that no investigation of any matter mentioned in the indictment had been begun by the grand jury within the meaning of §284 of the Judicial Code during the November term, which term expired March 2, 1941.

On demurrers to the pleas and motions to strike them, the district court sustained the demurrers and granted the motions. The defendants then petitioned the Circuit Court of Appeals for a mandamus directing the federal district judge to reinstate the pleas in abatement and the government's replications and to set the issues raised for a trial by a jury. The circuit court granted the writ.

On certiorari, the Supreme Court, in an opinion by the CHIEF JUSTICE, reversed the ruling of the circuit court, and held that a writ of mandamus may not be resorted to ordinarily as a means of review where a statutory method of appeal has been prescribed to review an appealable decision of record. The Supreme Court states that in issuing the writ of mandamus the circuit court did no more than substitute mandamus for an appeal contrary to the statutes and policies of Congress which has restricted that Court's appellate review to final judgments of the district court.

Mr. Justice MURPHY took no part in the consideration or decision of this case.

The case was argued by Mr. Paul A. Freund for Roche et al. and by Mr. Francis R. Kirkham for the Milk Association.

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**Criminal Law—Sentence Served—Moot Case**

*St. Pierre v. U. S.*, 87 L. ed. Adv. Ops. 922; 63 Sup. Ct. Rep. 910; U. S. Law Week 4362. (No. 687, decided May 3, 1943.)

St. Pierre, testifying before a federal grand jury, confessed to embezzlement but refused to state whose money he had taken. For this refusal he was sentenced to five months' imprisonment for contempt. He petitioned the Supreme Court for a writ of certiorari, setting up that his constitutional right of immunity from self-incrimination had been violated. Certiorari was granted, but on argument it was conceded that at that time the sentence had been fully served. The petitioner nevertheless contended (1) that he would be asked the same questions again and would be subject to commitment if he refused to answer, and (2) that the original contempt order, if unreversed, might impair his future credibility as a witness. The Supreme Court, in a *per curiam* opinion, disposed of these two points briefly and dismissed the case as moot.

The case was argued by Mr. Edward V. Broderick for St. Pierre.

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**Criminal Law—Impersonating an Employee of the Government**

*U. S. v. Lepowitch et al.*, 87 L. ed. Adv. Ops. 797; 63 Sup. Ct. Rep. 914; U. S. Law Week 4319. (No. 629, decided April 19, 1943.)

In an opinion by Mr. Justice BLACK the judgment of the District Court for the Eastern District of Missouri, sustaining a demurrer to an indictment under 18 U. S. C. § 70 for impersonating FBI officers with intent to defraud, was reversed. It was held that the words "intent to defraud" require no more than that "the defendants have by artifice and deceit sought to cause the deceived person to follow some course he would not have pursued, but for the deceitful conduct."

Mr. Justice RUTLEDGE concurs in the result.

Mr. Justice ROBERTS believes that the judgment should be affirmed.

Mr. Justice MURPHY took no part in the consideration or decision of this case.

The case was argued by Mr. Archibald Cox for the United States and by Mr. Henry S. Janon for Lepowitch.

### Motor Carrier Act of 1935—Construction of "Grandfather" Clause

*Noble v. United States et al.*, 87 L. ed. Adv. Ops. 890; 63 Sup. Ct. Rep. 950; U. S. Law Week 4324. (No. 511, May 3, 1943.)

The carrier here had been a contract carrier by motor vehicle before July 1, 1935, carrying under individual contracts with persons engaged in canning or meat-packing. He applied for a permit under the "grandfather" clause of § 209(a) of the Motor Carrier Act, 1935. He was entitled to a permit, and received one.

His complaint to a three-judge federal court was that the Commission wrongfully restricted his permit to operations for the shippers or types of shippers for whom he may haul specific commodities, so that his continued operations under the permit would be of the same restricted character as they had been prior to the critical date. The three-judge court sustained the Commission.

On appeal the Supreme Court affirmed in an opinion by Mr. Justice DOUGLAS.

Mr. Justice MURPHY did not participate.

The case was argued by Mr. Charles A. Lethert and Mr. C. D. Todd, Jr., for Noble, by Mr. Allen Crenshaw for the United States and the Interstate Commerce Commission, and by Mr. Franklin R. Overmyer for Regular Common Carrier Conference of the American Trucking Associations.

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### Indian Lands—Exemption from State Taxation

*County Commissioners, Okla. v. Seber*, 87 L. ed. Adv. Ops. 807; 63 Sup. Ct. Rep. 920; U. S. Law Week 4311. (No. 556, decided April 19, 1943.)

In an opinion by Mr. Justice MURPHY the Supreme Court affirmed a judgment of the Circuit Court of Appeals which affirmed in part a judgment of the district court that certain Indian lands were exempted from Oklahoma taxes, and allowed recovery with interest for taxes paid for certain years and declared certain of those tracts exempt from further state taxation. The Supreme Court held that the Act of June 20, 1936 (49 Stat. 1542) extended tax immunity to all the lands in question for the year 1937, that thereafter the amendatory act of May 19, 1937 (50 Stat. 188) exempted two of those tracts, and that both statutes were constitutional.

Mr. Justice REED took no part in the consideration or decision of the case.

Mr. Justice RUTLEDGE filed an opinion, in which Mr. Justice ROBERTS joined, concurring in part and dissenting in part.

The case was argued by Mr. Houston E. Hill and Mr. Mac Q. Williamson for County Commissioners and by Mr. Warner W. Gardner for the United States as amicus curiae by special leave of Court, and by Mr. George H. Jennings for Seber et al.

# AMERICAN LAW INSTITUTE ANNUAL MEETING

By HON. HERBERT F. GOODRICH

Adviser on Professional Relations

PHILADELPHIA was, for the second time, the scene of the American Law Institute's annual meeting. It was held on May 11, 12 and 13. Wartime travel reduced the numbers and wartime considerations likewise reduced the length of time devoted to the meeting and caused the omission of its usual pleasant attendant social affairs. In addition to administrative business, two full days were devoted to the Restatement of the Law of Property and two sessions to a preliminary discussion of a proposed International Bill of Rights.

The international aspects of the meeting were brought to the fore early in the meeting when Mr. Justice Wiley Rutledge at the opening of the sessions emphasized the responsibility of the United States and the opportunity of the American lawyer for a contribution to a durable peace and a better world order. The Justice said:

"This [present] fight goes deeper. It is not merely a renewal of national conflicts or a reopening of the last war after time for recovery of strength. It is these things, of course. But it is more. It is the culmination, not of years or of decades, but of centuries of struggle. The basic conflict is not new. It is between two elemental ideas. One is the idea that government is made for man, the other that man is made for government.

* * *

"But now we face the final and the decisive test. There is escape for no nation and for no man. This is Armageddon. We now face the decision whether the one or the other idea of man's relation to his institutions shall rule in the world, throughout its expanse and for centuries to come after our own.

* * *

"But, if we put aside that prospect, as we must, the logic of our own victory dictates we shall not repeat our previous error. We, too, cannot keep the peace, . . . by keeping it for ourselves alone. We cannot have peace by withdrawing from the task of making it. And creating peace is a task not simply for the conclusion of war, but for all the years in which peace is maintained. Our task then is not merely to win the peace at arms and declare it. That will be but to conclude the war. Beyond that we must work, with whatever force we have, physical or moral, to see that the end of this war is not merely the beginning of another, but is rather the starting point for a continuous effort which will create and maintain a structure of law for the nations of the world, thereby guaranteeing that each may maintain a structure of law for its citizens.

"If we do this, others will join the effort. If we think it can be done, it will be done. At bottom the problem is for ourselves to solve, for without us others cannot solve it. No nation or group of nations can create the essential framework for peace under law, if any powerful one remains aloof. This does not mean we must or could assume the whole burden. It does mean we must not shirk our share.

"If we will assume it, the coordinated evolution of the last half millennium can go on to its proper culmination. National sovereignties can be united in a federated structure, perhaps not unlike our own, to maintain for themselves a measure of freedom none can secure for itself alone and for their citizens a structure of law, built upon a foundation of peace which will perpetuate the correlative evolution of individual liberty. We can bring a millennium of stabilized freedom, for men and for nations, to the earth, if we will. That is a goal worth fighting this war to attain. It is the only one likely to come from it which makes the fight worth while.

"The task is essentially the lawyer-statesman's duty. The decision is in the lawyer's hands. If he will make it, the nation will also. To do so requires that he see the need, place the magnificent end above divisions over the less important methods or details, as did those who erected the framework of our government, and, as they likewise did, convince the people that even an imperfect structure of law and peace is preferable to chaos or armed truce. That is the great service the lawyer of our time can render. It is one he alone, perhaps, can accomplish. I give it to you in the spirit of the lawyers of another day who called our people, first, to arms that they might have liberty and independence, then to a way of peace we have enjoyed, with one interruption, for a century and a half. Their hour was big with creation. So may be our own, if we emulate their example."

### International Bill of Rights

In his introductory statement William Draper Lewis, director of the Institute, said that the Institute's International Bill of Rights Project has two purposes: (1) to ascertain how far the liberal elements of all countries have similar ideas of individual rights; (2) to ascertain how those rights on which all unite can be expressed in a manner acceptable to their different traditions and conditions.

In closing the sessions George Wharton Pepper, president of the Institute, strongly emphasized these limitations on the scope of the Institute's project. He said that in planning for a post-war world two approaches are possible: One way is to design an elaborate international

mechanism implemented by police power, economic agreements, and in general a framework of world organization to be fitted over the globe regardless of the needs or desires of men. The other approach is to attempt first to define the basic needs and aspirations common to all men, if such there are, and state the right to their satisfaction in a legal document protecting the individual against the state. This done the international mechanism can be devised. It is the latter approach, without which the former can have no chance of success, that President Pepper said the Institute has adopted. Its task is not to concern itself with how the rights shall be secured. Its task is solely to define and state the rights.

Director Lewis stated that in carrying out its task the Institute had followed its traditional procedure of enlisting a group of advisers. The group consists of lawyers and political scientists representing many existing cultures—European, Asiatic, Latin American, as well as North American. Dr. Lewis reported that the committee had so far reached general agreement that the traditional personal rights guaranteed by our Bill of Rights are today accepted as basic among practically all peoples not infected by Nazi or Japanese ideologies. Concerning this class of rights, therefore, the Institute's task is to express them in language which will make their scope and limitations clear.

He also reported that the committee had found agreement among representatives of many cultures other than our own that a modern Bill of Rights should include rights involving positive action by public authorities. Of such are the so-called social and political rights—the right to an education, to work and to vote. Dr. Lewis emphasized that these were but tentative findings and in no way committed the committee of advisers to any definite conclusions. The purpose in bringing the subject to the attention of the Annual Meeting at this time was to familiarize the Institute with the nature of the problems and difficulties involved in drafting a modern International Bill of Rights and to get through general discussion opinions that would help to guide the committee in its further work.

Noel T. Dowling, professor of constitutional law at Columbia University, discussed the problems involved in restating the rights included in our own Bill of Rights and widely adopted in the constitutions of other countries. He pointed out that the meaning and application of the basic right of free speech have developed continuously over the last 150 years, principally by decisions of the Supreme Court. He demonstrated how the provision in the Fourteenth Amendment has been used constantly by the Supreme Court to determine the applicability of the freedoms guaranteed in the Bill of Rights.

This continual evolution of meaning and application renders difficult the phrasing of a guarantee of freedom of speech in an International Bill of Rights. He mentioned three questions that need to be answered: (1) Should anything be said about freedom of thought and opinion? That is, does freedom of speech imply freedom not to speak when for example a job is at stake? (2) Should freedom of speech be guaranteed equally to all people, citizens and aliens alike? (3) In form shall we content ourselves merely with the negative statement that freedom shall not be abridged; or should an effort be made to specify what is excluded from the freedom, which would mean a limitation on the individual's right; or should the area or circumstances in which the state may not interfere with freedom be described?

As a solution of these difficulties, Professor Dowling recommended that the text be as simple as possible and that definitions and limitations be included in a supporting comment.

Dealing with the problem of whether a modern Bill of Rights needs to be implemented by a statement of the duties of the government to enforce the rights by positive action, David Riesman, Jr., assistant district attorney of New York County, pointed out that our classic rights, which in the Constitution are phrased solely as restrictions upon the government, are in fact powerfully implemented by our whole system of courts and judicial procedure. In other words, he said the rights stated in the Constitution are negative in form only. "In the working out, in rich detail, of the positive duties of the state to assure criminal and civil justice, our Anglo-American rights have been most creatively given meaning and vitality in daily life." It is, therefore, in Mr. Riesman's opinion no drastic change to conclude or to impose upon the government the duty of taking positive action to insure social rights to the individual. In other words, if the individual has a right to an education, to work, and to social security, the state must insure these rights by organizing preventive measures against sickness and occupational accidents, etc.

Mr. Riesman also emphasized the unitary nature of personal, social and procedural rights. "They are valuable not only in themselves, but as supports and flying buttresses for the rights of freedom of expression. I think it is now generally realized that men who lack productive work under tolerable conditions are not free to speak or otherwise to participate in the communities' decisions, not only because they fear for their security, but also because their way of life permits no opportunity for self-development."

"All the rights, but not the right to deny liberty," was the strong statement made by J. Alvarez del Vayo, former Foreign Minister of Spain and at present Executive Director of the Free World Association. "The experience of the last twenty years proves the urgency of reconsidering the whole problem of political rights. Since the appearance of Fascism in the world arena, freedom of speech has been used as a means of assaulting democratic institutions inside each country and of preparing the attack against democracies abroad.

Once in power, the Fascists, who used the right of free speech to carry on their propaganda for totalitarian ideas, suppressed free speech ruthlessly. They will do it again if they are allowed. Even if crushed by the total military victory of the United Nations, the Fascists everywhere will try to ruin the peace.

"As soon as one adopts this solid position of considering Fascism a crime, the question of the exclusion of Fascists from the right of freedom of speech is settled. Normally no nation allows any member of the community to make propaganda for crime. It is more important to protect the nation against the collective crime of Fascism. For those who deny liberty as Fascists do, no freedom of speech, no political rights. The new era after the war will be an era of active defense of democracy. It will be the era of 'compulsory democracy.'"

Dr. Hu Shih, former Ambassador to the United States from China, disagreed with Mr. del Vayo's argument that Fascists should be deprived of free speech, on the basis that "the limitation of freedom will mean its abnegation." Dr. Hu argued that healthy democratic philosophies immunize themselves against dangerous ideologies by permitting them to exist and fighting them on a common ground.

Judge Joseph C. Hutcheson, Jr., emphasized the traditional American concept that a Bill of Rights consists of curbs upon the government to protect the individual. He expressed doubt of the wisdom of the suggestion made by Professor Dowling and Mr. Riesman that the present "ceiling" over governmental power, incorporated in our constitutions, be supplemented by a "flooring" under governmental responsibility.

Professor Percy E. Corbett of the Law School of McGill University, who is now working in the Institute of International Studies at Yale, described the scope and nature of the committee's preliminary study of social rights. He said that it was impossible to avoid consideration of the inclusion of social rights in a modern International Bill of Rights since such rights have already been recognized in the constitutions of some forty countries in Latin America, Asia and Europe.

The discussion on Wednesday evening was devoted to consideration of whether a modern Bill of Rights should contain political rights. Dr. Karl Loewenstein, professor of political science and jurisprudence at Amherst College, acknowledged that the inclusion of political rights would result in making democratic forms of government compulsory. This, of course, represents a form of interference in the internal affairs of other countries. Dr. Loewenstein reviewed the history of the policy of non-intervention, showing that it first emerged in the French Revolution and was crystallized into a phrase by Canning in 1823 when he used it as an excuse for refusing to participate in punitive measures by the Holy Alliance against Spain. He argued that the repeated aggressions by totalitarian powers have rendered the non-intervention concept invalid.

Dr. Loewenstein pointed out that the peace-loving nations are the democratic nations, and that the first guarantee of world peace is that the peoples of each country shall be free and self-governing. He made plain his conception that political rights cannot and should not be given at once and indiscriminately to all nations and peoples on the globe; that for several countries a period of education and preparation is necessary.

Professor Warren A. Seavey, of Harvard Law School, expressed the fear that the inclusion of political rights would mean an imitation of the Nazi attempt to make the rest of the world conform to our own ideals. He emphasized the very diverse customs, beliefs and ideals of different countries. "It is essential for the welfare of the world that individual dignity shall be preserved," Mr. Seavey said. "Persons should not be coerced in their beliefs or in their expressions so long as these remain peaceful. They should have access to having their disputes both with each other and with their government decided in an impartial tribunal."

Underlining the basic importance of an International Bill of Rights to the formation of a world order after the war, Dr. Ricardo J. Alfaro, former President of Panama and former Panamanian Minister to the United States, said that the vast majority of men are now asking themselves "'What will happen to *me*? Where will *I* stand in the new order?' It is imperative to answer this question, and the right answer is an International Bill of Rights." Dr. Alfaro expressed the belief that the peoples of Latin America would desire to have their political and social rights as well as their personal rights protected by an international document.

Judge John Biggs, Jr., Senior Judge of the United States Circuit Court of Appeals, Third Circuit, said he would go even further in securing political, social and personal rights to all men, by making democracy compulsory and by providing an international organization with police powers to give effect to an International Bill of Rights.

Judge Orie L. Phillips, Senior Judge of the United States Circuit Court of Appeals, Tenth Circuit, expressed the view that consideration of the content of an International Bill of Rights must be based upon a recognition that isolationism is no longer possible and that the United States must take steps, political and economic, to preserve peace. Emphasizing his unreadiness as yet to decide what rights should be included in an International Bill, he urged that the Institute's drafting committee should go further on its exploratory and drafting task and that the Institute membership preserve an open mind to the facts and recommendations that will be developed.

The final conclusions of the committee will be offered for the consideration of the Institute at its 1944 meeting.

**Restatement of Property**

Three separate portions of the law in the field of Property were presented for discussion. One, dealing with material under the general heading of Easements, Licenses and Covenants Running with the Land, was developed by Professor Oliver S Rundell of the University of Wisconsin Law School, the Reporter. Another, the Reporter for which was Professor Richard R. Powell of Columbia University Law School, dealt with the well known but difficult questions involved in the Rule Against Perpetuities, and Restraints on Alienation. Finally, the third portion in charge of Julian S. Bush of the New York Bar, Assistant Reporter with Mr. Powell, dealt with Provisions in Restraint of Marriage, No Contest and Allied Provisions in Wills. Further work on the three divisions will proceed during the coming year and it is expected that all the remaining material in Property will be presented to the 1944 meeting in revised form, for final approval. There will be, therefore, no new volume of the Restatement published this year. 1944 will see the two volumes of Property. Their appearance will complete the Restatement of the Law.

The consideration of the Property Drafts raised numerous interesting and debatable problems. Most of the controversial sections were approved by the members of the Institute as reported. Some were recommitted for further consideration. One of these was the section dealing with the nature of the interest of a licensee and the protection to be accorded against interference by third persons with the interest. The fundamental policy of the Institute in drafting the volumes of the Restatement was made clear in the action taken on one of the sections dealing with promises respecting the use of land. The issue presented was whether the classic and accepted requirement of privity be retained. Though there was disagreement with the principle, it was accepted as what the law was rather than what it should be, since the function of the Institute was, wherever possible, to restate the law not to make it. A problem on which the state of authorities was less certain was involved in the question of when promises touch and concern land so as to bind as promisors the successors of the original promisor. The statement by the Reporter that the promise must benefit the promisee in the physical use or enjoyment of land possessed by him and that the burden on the land of the promisor should bear a reasonable relation to the benefit received by the person benefited was approved.

The questions raised by some of the proposed sections involving the rule against perpetuities necessitated a choice between conflicting and at times almost evenly divided authorities. Thus, the members accepted the recommendation of Professor Powell that the validity under the rule of a general testamentary power of appointment be determined by measuring the time from the date the power was created rather than, as in England, the date of its exercise. The same action was taken on the proposed section that the holder of an option invalid under the rule is entitled to neither a recovery of damages nor specific performance for failure of a person subject to the option to perform.

The sections on provisions in restraint of marriage, and no contest and allied provisions in wills, took the members of the Institute into consideration of social and public policies. In considering the former type of restraints, there had to be a balancing of society's interest of encouraging marriage and the family as against its interest in reasonable parental guidance. The results achieved take due consideration of both. Restraints on any first marriage are invalid. Partial restraints which do not make it unlikely that any permitted marriage will occur are valid. Social considerations were again paramount when the members of the Institute accepted the proposal that restraints on will contests are valid even in cases where probable cause to contest is present, with the exception of contests based upon forgery or subsequent revocation by a later will. It was the sense of the meeting that the wastage, scandal, family animosity and coercion of settlements engendered by will contests and the statistical fact that only two per cent of contests based on fraud, undue influence and lack of testamentary capacity are successful, favored the adoption of the rule proposed by the Reporter.

Although the subject considered was highly technical and would seem on first blush lacking in interest, it was the consensus of opinion that the discussions, though serious, were lively and fruitful.

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## John Henry Wigmore

*(Continued from page 317)*

1938 LL.D. *honoris causa*, Université de Lyon.
1940 Author, *Treatise on Evidence* (3d ed., 10 Vols.).
1941 Honorary chairman, *Modern Legal Philosophy* (New Series) publication committee.
1941 *Law and Justice Under the Tokugawa Shogunate:* Parts I, II.*
1941 Author, *A Kaleidoscope of Justice; Trial Scenes from all Times and Climes.*
1942 Author, *Pocket Code of Evidence* (3d ed.).
1943 Author, *A Guide to American International Law and Practice.*
1943 Died, April 20, Chicago, Illinois; buried, April 28, Arlington Cemetery, Arlington, Va.

*Referring to this work, in August 1942, Dean Wigmore wrote: "In 1935 the Society that appears as publisher (Kokusai Bunka Shinkokai) invited me to come back to Japan and undertake the completion of the editing of the entire work. I spent two months there in 1935, with three translators and three typists and organized the work. For the last seven years it has been going on. . . . The entire work would take some sixteen volumes. . . . The translation was almost finished by last August. . . . The tragedy is that the remainder will never appear, at least in my lifetime."

*NOTE: Mr. Wigmore was a member of numerous organizations, among the rest: American Bar Association, Illinois State Bar Association, Chicago Bar Association, corr. mem. Comite de Legislation Etrangere, International Academy of Comparative Law (The Hague), Belgian Royal Academy, etc.*

# COMMITTEE ON UNAUTHORIZED PRACTICE OF LAW

THE Committee on Unauthorized Practice of the Law will hold a meeting at the Drake Hotel, Chicago, May 29-31, at which various national problems in the unauthorized practice of law field, particularly in this wartime, will be considered. Relevant communications from state and local bar associations or members of the Association should be promptly transmitted to the Chairman.

### Compendium on Unauthorized Practice of the Law

The committee has been successful in distributing a substantial number of copies of this publication which has been published in order to make available to unauthorized practice of law committees, of state and local bar associations, and to the courts and lawyers generally, important data and material not otherwise readily available and which has been collected from the files of the committee. It is the latest publication on the subject of unauthorized practice of law, and copies may be obtained from Fred B. H. Spellman, Alva, Oklahoma.

### Chicago Bar Disapproves National Conference of Realtors and Lawyers

For many years, a controversy has existed between realtors and lawyers. At various times, and in different places, the Bar was attacked by the press for seeking to interfere with what was claimed to be the legitimate business of realtors and seeking to inconvenience the public by forcing them to engage lawyers. From the public point of view, the whole controversy was and is distasteful. Generally speaking, the public and the press were unsympathetic to the position of the Bar.

By resolution of the House of Delegates, adopted in January, 1940, that body approved the policy of this committee of

> endeavoring, through full discussion of unauthorized practice problems, to secure, wherever possible, the cooperation of national associations of laymen in the acceptance of principles relating thereto.

As a result of this policy, the cooperation of important national groups of businessmen was obtained through agreements and the setting up of national conferences and state and local conferences with such organizations as: The American Bankers Association, Trust Division; the National Association of Life Underwriters; The Association of Casualty & Surety Executives; International Claim Association; National Board of Fire Underwriters; National Association of Independent Insurance Adjusters—and by agreements in the law publishing field with a fully representative committee of national publishers of legal books, loose-leaf services, etc.

These reputable organizations have published and circulated to hundreds of thousands of people throughout the country the basic principles for which this committee has been contending in respect to unauthorized practice of law. Not only this, but the thousands and tens of thousands of interested persons have realized that the respective leaders of these various businesses have accepted these principles.

### Statement of Principles

Pursuant to this policy, after many years of negotiation, in May, 1942, a statement of principles was entered into between this committee and representatives of the National Association of Real Estate Boards and in that field, as in some of the others above mentioned, a National Conference Group was organized, consisting of five representatives of each association. The action taken was approved by the governing bodies of both associations.

In the Memphis statement, after all these years of controversy, the realtors agreed to the following Statement of Principles:—

> (1) The realtor shall not practice law or give legal advice directly or indirectly; he shall not act as a public conveyancer, nor give advice or opinions as to the legal effect of legal instruments, nor give opinions concerning the validity of title to real estate, and he shall not prevent or discourage any party to a real estate transaction from employing the services of a lawyer.
>
> (2) The realtor shall not undertake to draw or prepare documents fixing and defining the legal rights of parties to a transaction. However, when acting as broker, a realtor may use an earnest money contract form for the protection of either party against unreasonable withdrawal from the transaction, provided that such earnest money contract form, as well as any other standard legal forms used by the broker in transacting such business, shall first have been approved and promulgated for such use by the bar association and the real estate board in the locality where the forms are to be used.

All state and local bar associations and real estate boards were notified thereof on September 4, 1942, by a letter from the National Conference Group which recommended to them the desirability of adopting statements of principles *embodying in substance* the principles set forth in the resolution and that state and local conference groups be established in each locality.

The work of this committee and of the National Conference is purely advisory. The highly controversial subject involved must and should be handled locally, consistent with local conditions, by state and local bar

associations in cooperation with reputable real estate boards.

From the Bar generally and in bar journals, much favorable comment was received because steps had been taken to solve an endless controversy which was injurious to the good public relations of the Bar and detrimental to lawyers generally.

When the National Conference Group was organized and the Memphis statement drafted, the committee was faced with a conflict of laws in the several states as well as contradictory judicial decisions in respect, particularly, to the use and filling out of printed legal forms by realtors in transactions in which they were interested, and agreements between bar associations and realtors in some jurisdictions. Therefore, the language in the Statement of Policies was made most general and kept sufficiently flexible to preserve complete independence of action by each state and local bar association.

### No Test Case in Illinois

The committee was aware that the law of Illinois and certain decisions of its courts up to now might be considered more favorable to the Bar in that jurisdiction than elsewhere, as for example in Pennsylvania, New Jersey, and recently, in Ohio. Even in Illinois, no test case has yet been brought on the single issue of whether a realtor, if requested by his client, may not fill in a legal form in a transaction in which the realtor is acting as broker.

There is no legislation in Illinois as in some other states giving realtors the right to use legal forms as part of a licensing statute.

The Chicago Bar Association was fully apprized that, like any other state or local bar association in the country, it was entirely at liberty to adopt, restate or reject any portion of the Statement of Policies or any language therein which it deemed inconsistent with the laws of Illinois or of which it did not approve.

This committee is of the opinion that in this field, just as in all others, by the establishment of conference groups a better understanding of problems will be secured and their solution furthered. We urged the Chicago Bar Association to establish a conference group with their local real estate board and other representative realtor groups; that it seek a full understanding of the problems of both the realtors and the public in relation to the necessity for using printed forms, and that it endeavor to control and limit the unrestricted printing of forms, particularly those containing unfair clauses detrimental to the public interest.

It is the view of this committee that by such a method the cooperation of realtors can be secured to back a campaign of public education as to the necessity for legal advice in connection with real estate matters, and that reputable realtors would favor rather than oppose employment of lawyers by their customers at the inception of real estate transactions.

### The Scope of the National Association of Real Estate Boards

The National Association of Real Estate Boards is a national association of repute; it was organized as long ago as 1908; it has an active membership of about 16,000 firms with local real estate boards in 485 separate cities, and the salesmen, brokers, and employees reached through this organization exceed 300,000 in number. The Statement of Principles, from which we have quoted above, has been distributed and called to the attention of all realtors.

The committee's information is that progress is being made in many sections of the country toward a better understanding and better public bar relations since the adoption of the Memphis statement and the establishment of the National Conference Group and local groups, and believes this to be preferable to a continuation of the controversy involving litigations and acrimonious public discussions in the legislatures between lawyers and realtors.

However, on April 19, 1943, the Chicago Bar Association adopted a resolution disapproving the Memphis statement and declining to follow the recommendations made by the National Conference Group. This, of course, is entirely within its province if it is believed in the interest of the lawyers and the public of Chicago to permit a situation to continue wherein admittedly, thousands of legal forms, contracts and other documents are in use in the City of Chicago, in connection with real estate transactions, about which no lawyer whatever is consulted and where a controversy has existed for many years between the realtors and the Bar.

### Chicago Bar Recommendation Will Be Considered at May Meeting

In addition, the Chicago Bar Association has seen fit to recommend that the American Bar Association rescind its approval of the Memphis statement and the National Conference Group, despite the fact that its committee on unauthorized practice of law has been made fully aware of the statutes, decisions and bar agreements that exist in other states.

At its coming meeting, this committee will consider what further steps should be taken with respect to this matter.

EDWIN M. OTTERBOURG, *Chairman*

# RESULTS OF ELECTION FOR STATE DELEGATES

ON May 22, 1943, the Board of Elections met at the Headquarters of the Association, canvassed the ballots, and announced the results of the balloting for State Delegates. In seventeen jurisdictions delegates were elected for the regular three-year term beginning at the conclusion of the 1943 Annual Meeting of the Association. Louisiana also voted for a delegate to fill a vacancy in the term to expire at the conclusion of the next Annual Meeting. Four states voted for delegates to fill vacancies in terms to expire at the conclusion of the 1944 and 1945 Annual Meetings.

In the twenty-two jurisdictions voting there were only three (Indiana, Maryland and Oregon) in which two candidates were nominated by petition. Of those elected, fourteen succeed themselves in office. There were 13,017 ballots mailed to the members in good standing in the twenty-one jurisdictions (excluding Hawaii) of which 5,099 were returned. There is no report on Hawaii at this time as the polls do not close until June 25th for return of ballots from that jurisdiction.

The official report of the results of the election is as follows:

## ELECTION FOR STATE DELEGATES - 1943

| *Jurisdiction* | *Delegate Elected* | *Votes Received* | *Ballots Returned* | *Ballots Mailed* |
|---|---|---|---|---|
| Arkansas | A. W. Dobyns, Little Rock | 104 | 107 | 203 |
| Colorado | James A. Woods, Denver | 121 | 135 | 352 |
| Delaware | James R. Morford, Wilmington | 34 | 40 | 106 |
| Georgia | Arthur G. Powell, Atlanta | 167 | 178 | 335 |
| Idaho | A. L. Merrill, Pocatello | 45 | 47 | 86 |
| †Illinois | Tappan Gregory, Chicago | 866 | 907 | 2,511 |
| Indiana | Harold H. Bredell, Indianapolis | 138 | 288 | 596 |
| Louisiana | Pike Hall, Shreveport (Vacancy) | 149 | 159 | 430 |
| | Pike Hall, Shreveport (Regular Term) | 152 | 158 | 430 |
| Maryland | W. Conwell Smith, Baltimore | 236 | 455 | 629 |
| *Massachusetts | Frank W. Grinnell, Boston | 397 | 410 | 1,111 |
| Minnesota | Charles W. Briggs, St. Paul | 212 | 227 | 507 |
| Nevada | Charles A. Cantwell, Reno | 42 | 44 | 106 |
| New Hampshire | Louis E. Wyman, Manchester | 65 | 69 | 126 |
| *New Mexico | Herbert B. Gerhart, Santa Fe | 41 | 42 | 98 |
| New York | George H. Bond, Syracuse | 833 | 886 | 3,532 |
| Ohio | Howard L. Barkdull, Cleveland | 555 | 580 | 1,411 |
| Oregon | F. M. Sercombe, Portland | 109 | 176 | 246 |
| Rhode Island | Henry C. Hart, Providence | 85 | 92 | 174 |
| Utah | Robert L. Judd, Salt Lake City | 60 | 66 | 122 |
| *Vermont | Deane C. Davis, Barre | 54 | 56 | 90 |
| West Virginia | Frank C. Haymond, Fairmont | 132 | 135 | 246 |
| | Totals | | 5,099 | 13,017 |

†For vacancy in term expiring at adjournment of 1945 Annual Meeting.
*For vacancy in term expiring at adjournment of 1944 Annual Meeting.

BOARD OF ELECTIONS
EDWARD T. FAIRCHILD, Chairman
WILLIAM P. MACCRACKEN, JR.
LAURENT K. VARNUM

# WAR NOTES

By TAPPAN GREGORY

Of the Chicago Bar

THE Court and Commercial Newspaper Syndicate, through the columns of the *Virginia Bar Weekly*, calls attention to the following new laws of benefit to those in the armed forces:

For the protection of jobs of men entering the service—Utah and Nevada.

Safeguarding unemployment compensation for service men,—Arkansas, North Dakota, Nevada, Iowa, Vermont, Wyoming. Similar legislation in Delaware.

Exempting service men from state income tax on military pay and allowance,—Arkansas, California Indiana, New York, North Dakota, Wisconsin.

Extension to veterans of the present war of certain exemptions already granted to those of the last war,—Idaho, Indiana, Kansas, Nevada, North Carolina.

Concessions as to admissions taxes,—Maryland.

Renewal of motor vehicle operators license without fee,—Maine.

Giving the right to attend state educational institutions without payment of tuition,—Montana and South Dakota.

Scholarships to children of war veterans,—New Hampshire.

Creation of a veterans' post-war rehabilitation fund of one million dollars,—North Dakota.

Providing for educational and rehabilitation aid,—Oregon.

Protection of absentee voting rights,—Montana, North Carolina, Oregon.

Providing for the mailing of absentee ballots,—Arkansas.

Maintaining of registration of servicemen,—Michigan.

Providing for release of parolees honorably discharged after service since Pearl Harbor,—New York.

Legislation making provision for acknowledgments by those in the armed forces before commissioned officers has been passed in South Dakota, Kansas, Massachusetts and Michigan.

In Kansas, legislative provision has been made for the recording of powers of attorney. The same Act accomplishing this also provides that the death of the principal shall not operate to revoke an agency created by him, where the instrument creating the agency has been recorded, as to those who act in good faith without notice of such death. Notice of this Act appears in the Kansas Judicial Council Bulletin where there is also a reference to the statutes on acknowledgments.

The *South Dakota Bar Journal* calls attention to the amendment to the Uniform Acknowledgment Act and contains an interesting note of an opinion from Howell L. Fuller suggesting the advisability of making the necessary showing under the Soldiers' and Sailors' Civil Relief Act in probate proceedings, especially where distribution is made.

The *Massachusetts Law Quarterly* which carries a reference to the statute on military acknowledgments also contains a note of a new act providing procedure in the Land Court to secure authority to make a foreclosure entry under the new Soldiers' and Sailors' Civil Relief Act.

The *Michigan State Bar Journal* refers to the new military acknowledgments statutory enactment as an amendment to the Uniform Acknowledgment Act.

The War Committee of the Bar of the City of New York, through its Sub-committee on Legislation and Regulations, according to the *New York Law Journal*, is embarking on a very excellent project consisting of a thorough study of the Soldiers' and Sailors' Civil Relief Act in an effort to ascertain how it may be improved.

According to a report in the *New Jersey Law Journal* (C.C.N.S.), the New York Supreme Court, Special Term, holds that it is still the law that military authorities have a right on demand to the custody of a soldier held by civil authorities on a criminal charge.

The same publication calls attention to a case in the New Jersey Court of Error and Appeals holding that in that state when the mayor of a city, having a population in excess of 12,000, accepts a commission in the armed forces, his office as mayor does not become vacant.

The *Legal Record*, published in Detroit, Michigan, calls attention to a case (Pa. Sup. Ct.) holding unconstitutional a statute providing for part payment of salaries of state employees to their dependents during the absence of such employees in the military service, on the ground that it constitutes class legislation.

The Supreme Court of Delaware holds unconstitutional the Soldiers Vote Act endeavoring to give to qualified voters in the armed forces, in the event of their absence on election day, the right to vote at their camps outside the state, on the ground that the constitution of the state requires that polling places be located within the territorial limits of the state.

In the District Court for the Eastern District of Michigan, Southern Division, it has been held that the Emergency Price Control Act is constitutional as it does not delegate legislative functions to the price administrator.

# JUNIOR BAR NOTES

By HUBERT D. HENRY

Secretary, Junior Bar Conference

THE War Readjustment Committee, after months of study and of collecting data, has recently sent to 1184 state and local bar associations and junior bar groups a letter presenting methods of meeting the various problems of attorneys in military service. It contains: suggested resolution to be passed by local bar associations, making it a point of honor for members to protect and assist in the reestablishment of the practices of lawyers in the Armed Forces upon their return; proposed announcements of entry into service, including a statement of lawyers designated to continue practice; method of signing pleadings for the absent member, and steps designed to facilitate return to practice, such as arranging for free library facilities and office accommodations, financing printing and mailing of return announcements, etc.

Enthusiastic replies received by the committee indicate that many bar associations not only are studying, but also are adopting, a number of the suggestions and recommendations of the letter. Requests for additional copies, to make possible the proper and expeditious consideration of the letter by a large group of the official personnel, have been received. Committee Chairman Lyman M. Tondel, Jr., 31 Nassau St., New York City, will furnish extra letters to associations needing them as long as the supply lasts, and will welcome reports from bar associations of actions taken as a result of recommendations.

The Junior Bar Section Committee of the Kansas City Bar Association for the current year consists of Arthur C. Brown, Jr., chairman, and Jesse L. Childers, Solbert M. Wasserstrom, Robert M. McCreight, Ben W. Swofford, George H. Clay, Vernon B. Kassebaum, Marcus J. Kirtley, Jackson K. Hurd, L. L. Knipmeyer, Robert A. Schroeder and Hugh B. Kuder, Jr.

The new officers of the Houston Junior Bar Association are: John C. Ridley, president; W. B. Browder, Jr., vice president, and Nelson J. Munger, secretary-treasurer. The directors are: William Ladin, Vincent Lucia, Durell Carothers, Jessie McDaniel, Paul Port, Leon Levy, and Fred Much.

Officers of the Black Hawk County (Iowa) Junior Bar Association elected at its annual meeting April 8 in Waterloo are: Paul L. Kildee, president; Everett H. Scott, vice president; and John C. Gates, secretary-treasurer.

The new officers of the Hampden County (Massachusetts) Junior Bar Association, elected at the annual meeting May 8 in Springfield are: Joseph R. Jennings, president; Leland Stone, vice president; Irving M. Cohen, secretary; Foster Furculo, treasurer; and Norman Stepno, James Duffy, Eugene Rile, Horace Fuller and Ralph Jandreau, directors.

At the annual meeting of the Junior Bar Section of the Hennepin County (Minnesota) Bar Association the following officers, all of Minneapolis, were elected: George P. Hoke (Junior Bar Conference State Chairman), chairman; Fred Thomas, vice chairman, and Miss Rosemary Moskalik, secretary-treasurer.

The Junior Bar Section of the Bar Association of Arkansas held its annual meeting on May 7 in Hot Springs and elected Jerry H. Glenn, Little Rock, chairman; Lyle Brown, Hope, vice chairman; and H. W. McMillan, Arkadelphia, secretary.

The new officers of the Junior Bar Section of the Florida State Bar Association are: Julius F. Parker, president, and Clarence Brown, secretary-treasurer.

The present officers of the Barristers' Club of San Francisco are: Scott C. Lambert, president; William Knapp, vice president, and Hamilton Barnett, secretary. Elden Friel and James E. Burns are directors.

Conference Chairman Joseph D. Calhoun has appointed G. Arthur Howell, Jr., of Atlanta as state chairman for Georgia to succeed E. D. Smith, Jr., resigned. William A. Mason, of Charlotte, has been appointed state chairman for North Carolina.

At the annual meeting of the National Conference of Judicial Councils in Philadelphia, James P. Economos, secretary of the Traffic Court Committee, reported his recent trip to the southwestern states. He visited traffic courts in Houston, San Antonio, Dallas, Denver, Tulsa, Topeka and Kansas City, Mo. The physical facilities of the various courtrooms were inspected and recommendations for improvements therein were advanced. Judge Earle W. Frost, Kansas City, chairman of the committee on traffic courts of the National Safety Council, suggested several plans for cooperation with the Junior Bar Conference.

Following the Philadelphia meeting, Mr. Economos was joined by Chairman Joseph D. Calhoun for a series of conferences in the New England States. They met with the following Junior Bar Conference representatives: John Leddy in Portland, Me.; Charles W. Tobey, Jr., and Arthur A. Greene, in Manchester, N. H.; and Dana W. Swan and A. Anthony Susi in Providence, R. I. In Boston, Chairman Calhoun and Vice Chairman Economos met with the Junior Bar Section of the Boston Bar Association.

## NOTICE TO MEMBERS OF JUNIOR BAR CONFERENCE

**Notice is hereby given that at the annual meeting of the Junior Bar Conference to be held in Chicago, Illinois, beginning August 22, 1943, there will be elected a Chairman, Vice Chairman, and Secretary, each for a term of one year, a member of the Executive Council from each of the First, Third, Fifth, Seventh and Ninth Judicial Circuits, and the District of Columbia, each for a term of two years, and from each of the Second, Fourth, Sixth, and Tenth Judicial Circuits (to fill vacancy), each for a term of one year.**

Pursuant to Section 4(B) of Article IV of the By-Laws, notice is hereby given that the members of the Junior Bar Conference residing in the above named Judicial Circuits and District of Columbia (hereinafter referred to as Council Districts) may nominate candidates for the office of member of the Council from their respective districts by written petition, in each case, specifying the name of the person nominated and the office for which nominated, containing the names of at least twenty endorsers, all of whom are residents of the district of the person nominated. The petition can state briefly a biographical sketch of the background and qualifications of the candidate. It shall be submitted to the Chairman, Joseph D. Calhoun, 218 W. Front St., Media, Pennsylvania, not later than August 7, 1943. At the first session of the annual meeting, the Chairman of the Conference shall deliver to the Chairman of the Nominating Committee all petitions submitted pursuant to this notice.

The Nominating Committee shall consider the candidates proposed by each of said petitions, as well as receive names of other candidates and report its Council nominees at the same time and place, and in the same manner that it reports the nominations for the officers of the Conference. Other nominations for the Council may be made from the floor following the report of the Nominating Committee, as may other nominations also be made for officers. The election of Council members shall take place at the same time and place, and in the same manner as the election of officers, immediately following the conclusion of the second general session of the annual meeting, and shall be by written ballot.

TERM OF OFFICE: The term of office of the officers and the Council members from the Second, Fourth, Sixth and Tenth Judicial Circuits elected at the Chicago annual meeting shall begin with the adjournment of the said annual meeting and end with the adjournment of the annual meeting to be held in 1944, or until their successors shall be elected and qualify, and the term of office of the Council members from the First, Third, Fifth, Seventh, and Ninth Judicial Circuits, and the District of Columbia, shall begin with the adjournment of the said annual meeting and end with the adjournment of the annual meeting to be held in 1945, or until their successors shall be elected and qualify.

ELIGIBILITY: No person shall be elected as an officer or member of the Council if he will, during his term of office, become ineligible for membership in the Conference. The membership of a member of the Conference shall terminate at the conclusion of the annual meeting in the calendar year within which the member attains the age of thirty-six years, or upon his ceasing, prior to that time, to be a member of the American Bar Association. A person elected as a member of the Council shall be, at the time of his nomination, a resident of the Council District for which he is chosen. No person shall be eligible for election as a member of the Executive Council if he is then a member of the Council and has been such a member for a period of three years or more.

HUBERT D. HENRY, Secretary
Junior Bar Conference of the
American Bar Association.

# *Letters to the Editors*

*THE letter reproduced below was addressed to the Chairman of the Patent Section of the Association. Roy Hackley, referred to in the letter, is last year's Chairman of the Section.*

*Dear Brother Patent Lawyer:*

This is a voice from the wilderness, as far as patent law is concerned. There are some cases here, however, that need attention.

Some time, favored by wind and tide and the fortunes of war, I hope to return to practice, and I am anxious to know of the news in the Section. Is this letter going to Roy Hackley, as I suspect it is? What of importance to us patent lawyers is going on now?

The Arabs are people such as portrayed in the *New Testament*. Their life is nomadic. Most seem to own some livestock. Their houses are thatched huts or wigwams covered with felt. I imagine the best of the Arab huts could be bought for $2.50. The wealthy Arabs, however, live in great comfort and even luxury.

Don't let anyone talk of the heat in Africa. It is a myth on a par with the Sunny France of the last war.

The economic sense of the lower class Arab is illustrated by the following: Yesterday I saw a two-horse plow which could have been handled by a fifteen-year-old farm boy from the States. Of course it was designed to be pulled by two horses. Two Arabs manned the plow. It was pulled by seven bulls and one cow led by one donkey. Each animal had an Arab tender. When the end of the row was reached, a crisis broke —which way to turn. Everyone had his say. The Arab with the lead donkey fell into a frenzy and beat the donkey in the face, and the donkey turned to avoid being blinded. This was repeated at each row.

Please give my regards to my good friends of the Association. I miss them much and hope to review old times some day.

LT. COL. HARRY H. SEMMES
Africa

*To the Editors:*

AFTER several readings of Judge Galston's cleverly titled article in the April Issue, I am still doubtful. One of my doubts is whether "sentimentalism" is really the most important obstacle that prevents a proper evaluation of the jury system.

That many seek to avoid jury service is hardly a conclusive indictment. A realistic view discloses few patriotic responsibilities to which men spring with maximum passionate ardor.

Perhaps jurors do often fail to grasp the "cold logic of the case." It is conceivable that a valid system of justice allows for other factors too, assuming that controls are available by which to keep logic at the desired temperature.

Some of the authorities quoted are less significant than they might have been. Justice Cardozo's view was expressed in a case in which the right to trial by jury was not even remotely involved; and the quoted statement itself is one of those well-tooled generalities that do not add much to our understanding. And as to the study by Judge Clark and Professor Shulman, the footnote citation seems to be incorrect; but in the Journal cited there does appear a review (by Mr. Walter F. Dodd) which questions the adequacy of the study for some of the conclusions drawn.

As to the imperfect methods of jury selection, it may give some amusement to contemplate the result if the oscillating wheel of a chronometer were selected in the manner in which judges are chosen for the Chicago Municipal Court.

It is somewhat difficult to tell whether Judge Galston favors abolition or reform. In either event it is respectfully suggested that even a "pathetic fallacy," so solid in tradition, deserves to be attacked with more persuasive analysis and more relevant scholarship.

HARRY SHRIMAN

Chicago

*To the Editors:*

I NOTE with interest two comments published in the current issue of the JOURNAL on the subject of your new column, "There is a Time to Laugh." The letters appear at page 301.

I do not regard my own reaction as being important and would not express it except for the fact that other people appear to do so. Good fun is good fun, and I appreciate it, but I don't read the JOURNAL for fun, and I find ample release in the matter of printed fun in *Esquire* magazine, and Saroyan's compositions. West Publishing Company's *Docket* is loaded down with so-called fun, most of which is good for a grammar school student and nobody else.

Of course I don't have to read the column, but surely there is other material of value which could fill the same space.

W. H. MITCHELL

Florence, Ala.

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*To the Editors:*

NO ENCOMIUM upon the general character of your publication is needed, but I am particularly pleased with the splendid series of biographical sketches of members of the profession who have in the past generations distinguished themselves by public service.

Again, it is a source of real gratification to me that you have seen fit to intersperse a column of humor. I recall a discussion had some years ago on the question of the advisability of carrying such a department in the JOURNAL and I confess that at the time I was a bit disappointed that the idea did not find editorial favor for I think that if there is anyone who is fairly entitled to avail himself on occasion of the scriptural "time to laugh," it is the practicing lawyer.

L. M. SANBORN

Portland, Maine

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THE year 1943 promises to be the grimmest, hardest year this country has ever faced. Every effort, and every dollar of national income not absolutely needed for existence, should go into war work and War Bonds.

In the Pay Roll Savings Plan, America finds a potent weapon for the winning of the war—and one of the soundest guarantees of the preservation of the American way of life!

Today about 30,000,000 wage earners, in 175,000 plants, are buying War Bonds at the rate of nearly half a billion dollars a month. *Great as this sum is, it is not enough!* For the more dollars made available now, the fewer the lives laid down on the bloody roads to Berlin and Tokio!

You've undoubtedly got a Pay Roll Savings Plan in your own plant. But how long is it since you last checked up on its progress? *If it now shows only about 10% of the gross payroll going into War Bonds, it needs jacking up!*

This is a *continuing* effort—and it needs *continual* attention and *continual* stimulation to get fullest results.

You can well afford to give this matter your close personal attention! The actual case histories of thousands of plants prove that the successful working out of a Pay Roll Savings Plan gives labor and management a common interest that almost inevitably results in better mutual understanding and better labor relations.

Minor misunderstandings and wage disputes become fewer. Production usually increases, and company spirit soars. And it goes without saying that workers with substantial savings are usually far more satisfied and more dependable.

And one thing more, these War Bonds are not only going to help win the war, they are also going to do much to close the dangerous inflationary gap, and help prevent post-war depression. The time and effort *you* now put in in selling War Bonds and teaching your workers to save, rather than to spend, will be richly repaid many times over—now and when the war is won.

**You've done your bit ★ Now do your best!**